A

HONG LEONG BANK BHD

v.

STAGHORN SDN BHD & OTHER APPEALS

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
ABDUL AZIZ MOHAMAD FCJ
AZMEL MAAMOR FCJ
[CIVIL APPEAL NOS: 02-14-2005(B), 02-15-2005(B)
C & 02-17-2005(B)]
26 DECEMBER 2007

CIVIL PROCEDURE: *Parties - Intervention - Application to intervene in proceedings to set aside order for sale and auction sale - Whether*
D *proceedings still in existence - Whether object of intervention beyond attainment - Whether applicant qualified to intervene - Rules of the High Court 1980, O. 15 r. 6(2)(b)*

LAND LAW: *Lien - Sale of land by court - Whether registered*
E *proprietor could deposit document of title as security for loan to third party - Whether judgment could be obtained against third party - Whether document of title could be deposited by third party*

WORDS & PHRASES: *"At any stage of the proceedings" - Meaning*
F *of - Rules of the High Court 1980, O. 15 r. 6(2) - When a party may apply for leave to intervene in proceedings*

The three consolidated appeals herein pertained to a piece of land (the 'land') which was successfully auctioned off after an order for sale to satisfy a sum of RM5.5 million owed by one Park Avenue
G to Hong Leong Bank Berhad ('HLB') which had held the land under a lien-holder's caveat. The facts showed that Staghorn Sdn Bhd ('Staghorn') initially purchased the land from its registered proprietors and paid a 10% deposit in respect thereof. Subsequently, the land was transferred to its sister company, Teck
H Lay Realty Sdn Bhd which paid the balance of the purchase on a loan taken with Bank Bumiputra Malaysia Berhad. The turn of events that followed led to Park Avenue which was Teck Lay's holding company, depositing the document of title to the land to HLB for entry of a lien-holder's caveat for a loan taken with HLB
I by Park Avenue in the sum of RM5.5 million. When Park Avenue defaulted in the repayments thereof, HLB obtained judgment that

led to the order for sale. The land was sold by public auction to one Wong Bin Chew ('Wong') to whom a certificate of sale was issued. Staghorn then applied for leave to intervene in the proceedings and to set aside the order for sale and the auction sale. Staghorn claimed that it was, at all times, the purchaser of the land. It argued that it was supposed to resell the land to Teck Lay which was to be subject to a third party charge to secure a loan given by HLB to Park Avenue. However, as the resale by Staghorn to Teck Lay did not materialise, Staghorn remained the beneficial owner of the said land and that the order for sale contravened s. 281 of the National Land Code ('NLC') rendering the order for sale and the auction sale void. The learned judge of the High Court ('HC') allowed Staghorn's application for leave to intervene which he held was leave under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 ('RHC') and set aside the order for sale and the auction sale. HLB and Wong who had intervened in the proceedings, appealed to the Court of Appeal ('CA'). The CA allowed the appeals on the grounds that there was no proceeding in existence when the order for intervention was made. Staghorn appealed to the Federal Court ('FC') which ordered the appeals remitted before the CA to be heard on all issues including the exercise of the court's discretion but excluding the issue on jurisdiction under O. 15 r. 6 RHC. The CA then dismissed the appeals by HLB and Wong, allowing Staghorn's application to intervene and setting aside the order for sale and the auction sale. The CA, however, disagreed with the orders of the HC to hand the document of title to Staghorn and to declare Staghorn as the true beneficial owner of the land. That decision led to the three appeals by HLB, Wong and Staghorn before the FC herein.

Leave was granted on five questions of law. The FC primarily addressed the first question, namely, whether a party with no proprietary rights in the land in question, could be allowed to intervene to set aside the order for sale. The other questions concerned the following: (1) whether a registered proprietor of land could deposit his document of title as security for a loan to a third party and whether judgment could be obtained against the third party under s. 281 NLC; (2) whether the document of title could be deposited by a third party with the consent of the registered proprietor; and (3) whether an order for sale made pursuant to a lien-holder's caveat, created by the deposit of the document of title by a third party with the consent of the registered proprietor, illegal and liable to be set aside.

Held (allowing the appeals against the order for leave to intervene and against the setting aside of the order for sale): Per Abdul Hamid Mohamad CJ (Azmel Maamor FCJ concurring):

(1) An application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is *functus officio*. (para 58)

(2) An application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O. 15 r. 6 RHC. The application may be made "At any stage of the proceedings" meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes *functus officio*. (para 59)

(3) An application for leave to intervene is supported by affidavit. As such, the judge merely decides on affidavit evidence whether to grant leave. At that stage, the judge should not make a definite finding of fact which, as envisaged by O. 15 r. 6 RHC 1980 will and can only be made after all evidence has been adduced in the trial which will follow subsequently. (para 60)

(4) Any party whether a party in the original proceedings or not, who wants to challenge the order for sale or any judgment, other than a default judgment or where it is specifically provided for in the rules, may only do so by filing a fresh action. (para 61)

(5) While the principles laid down in *Pegang Mining* as to exercise of discretion are applicable, all the requirements of O. 15 r. 6(2) RHC must still be satisfied. (para 62)

(6) The learned judge of the HC allowed Staghorn to intervene after three years and five months after the order for sale was made. From the judgment the learned judge did refer to O. 15 r. 6 RHC but he failed to consider the opening words, "At any stage of the proceedings …". Instead, the learned judge relied on *Pegang Mining Co. Ltd v. Choong Sam & Ors* ('*Pegang Mining*') and *Arab Malaysian Merchant Bank Bhd v. Jamaludin Dato Mohd Jarjis* ('*Arab Malaysian*') for the principles applicable. While the principles laid down in *Pegang*

Mining as to the exercise of discretion were applicable, the learned judge should have addressed the first point, ie, whether there was a proceeding in existence for Staghorn to intervene. Only if a proceeding exists would the principles in *Pegang Mining* become applicable. (paras 64 & 65)

(7) The learned judge of the HC did consider the issue of *functus officio* but he did not ask himself the question whether the final order was made and perfected. Instead, the learned judge went to great lengths to consider whether the order for sale was validly made as if hearing an appeal. Having heard that the order for sale was wrong in law and should be set aside, the learned judge held that the judge who made the order for sale was not *functus officio* and allowed Staghorn to intervene. That approach was clearly wrong. (para 68)

(8) In an application to intervene by a non-party in a proceeding, a judge, firstly, has to determine whether there is a proceeding. Secondly, whether the applicant has shown that "there **may** exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. The judge should not make a definite finding of fact or law based on the facts that have not been adduced yet. (para 70)

(9) The CA failed to focus its mind on O. 15 r. 6(2) RHC and ask itself the question whether the learned judge of the HC addressed his mind to the said provision in the exercise of his discretion to grant the leave to intervene. Just because the learned judge cited the cases of *Pegang Mining* and *Arab Malaysian*, the CA concluded that the learned judge was firmly in grip with the relevant tests. The CA failed to consider whether "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. There was simply no issues left to be determined when the order had already been made, perfected and carried out completely. (para 77)

(10) The HC and the CA focussed on the validity of the order for sale instead of focussing on O. 15 r. 6 RHC. Having found that it was not validly made, the application to intervene was allowed relying on the exception in the case of *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* ('*Badiaddin*'). At the application stage to intervene under O. 15 r. 6 RHC, consideration should be given to the provision of the rule itself, ie, whether or not the application satisfied the requirements of the said rule. *Badiaddin* at that stage was irrelevant. It was only relevant in considering whether the previous order of the court could be set aside in a fresh action. (paras 78, 80)

(11) As a matter of judicial policy, a judge should not be allowed to re-open a case, set aside an earlier judgment or order and substitute it with his own. A point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom (Peh Swee Chin FCJ). Just because the second judge is of the view that the order of the first judge had caused injustice, it does not mean that the order to intervene should be given. The requirements of the rule still have to be satisfied. (paras 82, 83 & 87)

(12) The finding of facts by the CA regarding the rights of Staghorn did not support the test that it applied. The CA clearly held that Staghorn had divested its rights and interest and had no beneficial interest in the said land. Hence, Staghorn could not be said to have satisfied the test of having an interest to intervene. (paras 88 & 89)

Per Abdul Aziz Mohamad FCJ (concurring):

(1) The issue of jurisdiction under O. 15 r. 6 RHC does not hang upon the words "At any stage of the proceedings" alone. It is not those words alone that indicate that an order for the addition of a party in a cause or matter under r. 6(2)(b) of O. 15 is to be made only in a cause or matter that is extant and alive. The entire wording of para. (b) also so indicates and with greater force. It shows that the addition of a party is intended to achieve a comprehensive and global resolution of the cause or matter. The wording looks to the future outcome of the cause or matter. The addition of the party to be added is a contribution to the future outcome. It follows from the entire wording of

para. (b), even without the words "At any stage of the proceedings", that the addition of a party can only be made in a cause or matter that has not been concluded and brought to an end. The wordings of para. (b) will not enable a person to come in and be added as a party to undo what has already been done or decided in a cause or matter. (para 114)

(2) Once the question on jurisdiction under O. 15 r. 6(2)(b) RHC is excluded, there will be nothing left in the wording of r. 6(2)(b) to be considered in relation to the exercise of the court's discretion. Therefore, the FC could not have intended the question on discretion to be considered within the confines of O. 15 r. 6(2)(b) but as an application at large to undo what was done in the originating summons proceedings, namely, to set aside the order for sale made and perfected and the auction sale that was completed. (para 114)

(3) The case of *Pegang Mining* concerned the application of O. 16 r. 11 of the Rules of the Supreme Court 1957, the precursor of the present O. 15 r. 6(2)(b)(i) RHC. It applied the court rule as to the addition of an additional party to an ongoing case in order to enable the additional party to participate in the process of bringing the case to an overall satisfactory and just conclusion. The case of *Arab Malaysian* concerned the application of O. 15 r. 6(2)(b) RHC and it was applied to enable a person to come into a cause that had been decided in order to have the decision set aside. The subject matter in that case was a debt and the intended intervener had an interest in it because he had undertaken to pay it. He was allowed to intervene to set aside the judgment debt because otherwise he would have had to bear the excessive interest. Based on that authority, the intended intervener must have an interest in the subject matter of the case. If he seeks to intervene to set aside an order for sale of land he must have an interest in the land. If he is found to have no proprietary rights in the land, he is not qualified to intervene. It followed that the party to be added to an action must have sufficient interest in the subject matter of the action. (para 138)

(4) The CA decided that Staghorn was correctly allowed to intervene since Staghorn claimed that its rights would be affected by any judgment in the proceeding in this case. The cases of *Pegang Mining*, *Arab Malaysian* and *Gurtner v. Circuit* showed that the interest of a would-be intervener in the subject matter of the action must be shown to exist. He is not allowed to intervene merely on a claim that he has an interest in the subject matter. The "flexibility approach" mentioned in *Pegang Mining* is not to be taken to mean laxity in the standard to the qualification to intervene. More importantly was the positive finding by the CA that Staghorn divested itself of its rights and interests in the land to Teck Lay and that Teck Lay was the beneficial owner of the land. That was a finding of fact made after considering all documentary evidence. (paras 139 & 140)

(5) By finding that the evidence proved that Staghorn divested itself of its interests in the land to Teck Lay, the CA must have rejected Staghorn's bare allegation of its intended resale to Teck Lay. Having found that Staghorn had no interest in the land, the CA erred in concluding that Staghorn was correctly allowed to intervene. (paras 142 & 143)

(6) Subsection (1) of s. 281 NLC speaks of the registered proprietor depositing his issue document of title "as security for a loan" but does not specify the borrower. Neither does it restrict the loan to a loan to the registered proprietor. The loan may be a loan to a third party. Where the loan is to a third party, it must follow that under sub-s. (2), the judgment obtained is a judgment against the third-party borrower. (para 145)

(7) Subsection (1) of s. 281 NLC is an enabling provision. It enables or empowers the registered proprietor to deposit his issue document of title with any person or body as security for a loan. It does not lay down the procedure for or the manner of depositing. It ought not to be construed as requiring that the registered proprietor himself must do the act of depositing. It is his will that is important. If he wills that the document of title be deposited with a person or body as a security for a loan and it is so deposited, then it is he who has exercised his power under sub-s. 1. He wills

the depositing if he instructs, authorises it or consents to it. It followed that the actual act of depositing the document of title may be done by someone else. (para 146)

(8) On the facts of the case, the CA erred in applying *Badiaddin* to find that the order for sale and the auction sale could be set aside *ex debito justitiae*. It was a misplaced reliance on *Badiaddin*. Staghorn should not have been allowed to intervene because the object of intervention was beyond attainment. Also, with the finding that it had no interest in the land, it was not qualified to intervene. (para 148)

[Staghorn's appeal dismissed.]

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga rayuan yang disatukan di sini adalah berhubung sebidang tanah ('tanah') yang dilelong ekoran satu perintah jualan bagi menjelaskan sejumlah RM5.5 juta yang terhutang oleh Park Avenue kepada Hong Leong Bank Berhad ('HLB') yang memegang tanah di bawah satu kaveat pemegang lien. Fakta menunjukkan bahawa tanah mulanya dibeli dari pemilik berdaftar oleh Staghorn Sdn Bhd ('Staghorn') yang membayar 10% deposit baginya. Berikutnya, tanah dipindah kepada syarikat sekutu Staghorn, Teck Lay Realty Sdn Bhd yang membayar baki harga belian melalui pinjaman yang diperolehi dari Bank Bumiputra Malaysia Berhad. Perkembangan selanjutnya membawa kepada Park Avenue, yang merupakan syarikat induk Teck Lay, menyerah-simpan geran hakmilik tanah dengan HLB bagi membolehkan HLB memasukkan kaveat pemegang lien atas pinjaman yang diberikannya kepada Park Avenue sebanyak RM5.5 juta. Apabila Park Avenue ingkar dalam pembayaran, HLB mendapat penghakiman yang membawa kepada perintah jualan. Tanah dijual melalui lelongan awam kepada seorang Wong Bin Chew ('Wong') yang kemudian diserahkan dengan sijil jualan. Berikutnya, Staghorn memohon kebenaran untuk mencelah di dalam prosiding bagi mengenepikan perintah jualan serta jualan lelong. Staghorn menuntut bahawa ia adalah pembeli tanah pada semua waktu material. Menurut Staghorn, ia sepatutnya menjual semula tanah kepada Teck Lay dan mentaklukkan tanah kepada gadaian pihak ketiga bagi mendapatkan pinjaman dari HLB untuk Park Avenue. Penjualan semula tersebut bagaimanapun tidak terjadi, dan oleh itu ia masih

A lagi menjadi pemilik benefisial tanah. Dikatakan juga bahawa perintah jualan telah melanggar s. 281 Kanun Tanah Negara ('KTN') menyebabkan perintah itu serta jualan lelong menjadi batal. Yang arif hakim Mahkamah Tinggi ('MT') membenarkan permohonan Staghorn untuk kebenaran mencelah yang dikatakan
B oleh beliau sebagai kebenaran di bawah A.15 k. 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sekaligus mengenepikan perintah jualan dan jualan lelong. HLB dan Wong yang mencelah terhadap prosiding merayu kepada Mahkamah Rayuan ('MR'). Rayuan-rayuan dibenarkan oleh MR atas alasan bahawa tiada
C prosiding yang wujud ketika perintah untuk mencelah dibuat. Staghorn merayu ke Mahkamah Persekutuan ('MP') di mana MP memerintahkan rayuan-rayuan dikembalikan ke MR untuk didengar semula atas semua isu-isu termasuk isu pelaksanaan budibicara mahkamah, tetapi tidak termasuk isu bidangkuasa di bawah A. 15
D k. 6 KMT. Berikutnya, MR menolak rayuan-rayuan oleh HLB dan Wong, membenarkan permohonan mencelah Staghorn dan mengenepikan perintah jualan dan jualan lelong. MR bagaimanapun tidak bersetuju dengan perintah-perintah MT menyerahkan geran hakmilik kepada Staghorn atau mengisytiharkan Staghorn sebagai
E pemilik benefisial sebenar tanah. Keputusan MR ini membawa kepada tiga rayuan oleh HLB, Wong dan Staghorn di sini.

Kebenaran diberi atas lima persoalan undang-undang. MP telah menangani isu yang pertama, iaitu sama ada satu pihak yang tidak
F mempunyai hak pemilikan pada tanah boleh dibenarkan untuk mencelah bagi mengenepikan peintah jualan. Persoalan-persoalan selainnya adalah berkaitan dengan: (1) sama ada seorang pemilik berdaftar tanah boleh menyerah-simpan geran hakmiliknya sebagai jaminan bagi suatu pinjaman kepada seorang pihak ketiga dan sama
G ada penghakiman boleh diperolehi terhadap pihak ketiga tersebut di bawah s. 281 KTN; (2) sama ada geran hakmilik boleh diserah-simpan oleh pihak ketiga dengan persetujuan pemilik berdaftar; dan (3) sama ada perintah jualan yang dibuat berdasarkan satu kaveat pemegang lien, yang didaftar ekoran penyerah-simpanan geran
H hakmilik oleh pihak ketiga dengan persetujuan pemilik berdaftar, tak sah dan boleh diketepikan.

I

Diputuskan (membenarkan rayuan-rayuan terhadap perintah memberi kebenaran untuk mencelah dan terhadap pengenepian perintah jualan):
Oleh Abdul Hamid Mohamad KHN (Azmel Maamor HMP menyetujui):

(1) Permohonan untuk mengenepikan perintah jualan oleh satu pihak semasa kepada prosiding boleh dibuat sebelum perintah muktamad disempurnakan, di mana selepas itu hakim akan menjadi *functus officio*.

(2) Permohonan untuk kebenaran mencelah bagi mengenepikan perintah jualan oleh satu pihak yang belum lagi menjadi pihak kepada prosiding hendaklah dibuat di bawah A. 15 k. 6 KMT. Permohonan boleh dibuat "Di mana-mana peringkat prosiding ..." bermakna sebelum penghakiman. Jika sebaliknya, ia bermakna prosiding sudah pun ditutup dan tiada lagi apa-apa prosiding untuk pihak mencelah masuk. Hakim juga sudah *functus officio*.

(3) Permohonan untuk kebenaran mencelah adalah disokong oleh afidavit. Oleh yang demikian, hakim hanya membuat keputusan atas keterangan afidavit sama ada untuk memberi kebenaran. Pada peringkat itu, hakim tidak harus membuat apa-apa dapatan fakta tertentu kerana, seperti yang dinyatakan oleh A. 15 k. 6 KMT, itu hanya boleh dibuat selepas semua keterangan telah dikemukakan dalam perbicaraan yang menyusul nanti.

(4) Mana-mana pihak sama ada pihak dalam prosiding asal atau sebaliknya, yang ingin mencabar perintah jualan atau mana-mana penghakiman, selain dari penghakiman ingkar atau di mana ia dinyatakan secara spesifik dalam mana-mana kaedah, hanya boleh berbuat demikian dengan memfailkan satu tindakan baru.

(5) Di mana prinsip-prinsip seperti yang dibentang di dalam *Pegang Mining* mengenai pelaksanaan budibicara terpakai, kesemua kehendak-kehendak A. 15 k. 6(2) KMT masih perlu dipatuhi.

(6) Yang arif hakim MT membenarkan Staghorn untuk mencelah selepas tiga tahun dan lima bulan perintah jualan dibuat. Dari penghakimannya, yang arif hakim telah merujuk kepada A. 15 k. 6 KMT tetapi gagal mempertimbang ungkapan pembukaan,

"Di mana-mana peringkat prosiding …". Yang arif hakim sebaliknya bergantung kepada *Pegang Mining Co. Ltd v. Choong Sam & Ors* ('*Pegang Mining*') dan *Arab Malaysian Merchant Bank Bhd v. Jamaludin Dato Mohd Jarjis* ('*Arab Malaysian*') untuk prinsip-prinsip yang terpakai. Sementara prinsip-prinsip yang dibentang oleh *Pegang Mining* berkaitan pelaksanaan budibicara memang terpakai, yang arif hakim sepatutnya menangani isu pertama terlebih dahulu, iaitu sama ada prosiding wujud bagi membolehkan Staghorn mencelah. Hanyalah jika prosiding wujud maka prinsip-prinsip di dalam *Pegang Mining* boleh terpakai.

(7) Yang arif hakim MT telah menimbang isu *functus officio* namun gagal bertanyakan dirinya sama ada perintah yang muktamad telah dibuat dan disempurnakan. Sebaliknya, yang arif hakim telah menimbang dengan panjang lebar persoalan sama ada perintah jualan telah dibuat dengan sahnya seolah-olah mendengar suatu rayuan. Setelah mendapati bahawa perintah jualan adalah salah di sisi undang-undang dan harus diketepikan, yang arif hakim memutuskan bahawa hakim yang membuat perintah jualan tidak *functus officio* sekaligus membenarkan permohonan Staghorn untuk mencelah. Pendekatan sebegini adalah jelas salah.

(8) Dalam satu permohonan untuk mencelah oleh seorang yang bukan pihak kepada prosiding, seorang hakim, pertama sekali, hendaklah memutuskan sama ada prosiding wujud. Kedua, sama ada pemohon telah menunjukkan bahawa "there **may** exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". Hakim tidak harus membuat dapatan fakta atau dapatan undang-undang tertentu berdasarkan fakta-fakta yang belum lagi dikemukakan.

(9) MR gagal menumpukan perhatian kepada A. 15 k. 6(2) KMT atau bertanyakan dirinya sama ada yang arif hakim MT telah mengarahkan mindanya kepada peruntukan tersebut semasa melaksanakan budibicaranya memberikan kebenaran untuk mencelah. Cuma kerana yang arif hakim merujuk kepada *Pegang Mining* dan *Arab Malaysian*, MR terus sahaja merumuskan bahawa yang arif hakim telah berpijak kepada

fakta-fakta yang relevan. MR gagal menimbangkan sama ada "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". Yang jelas, tiada lagi isu yang perlu diputuskan apabila perintah telah dibuat, disempurnakan dan dilaksanakan sepenuhnya.

(10) MT dan MR hanya memberi perhatian kepada kesahan perintah jualan dan tidak kepada A. 15 k. 6 KMT. Setelah mendapati ianya tidak dibuat secara sah, permohonan untuk mencelah telah dibenarkan dengan bergantung kepada pengecualian di dalam kes *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* ('*Badiaddin*'). Di peringkat permohonan untuk mencelah di bawah A. 15 k. 6 KMT, pertimbangan harus diberi kepada peruntukan kaedah itu sendiri, iaitu, sama ada atau tidak permohonan memenuhi kehendak-kehendak kaedah tersebut. Pada peringkat ini *Badiaddin* adalah tidak relevan. Ia hanya relevan dalam mempertimbangkan sama ada perintah terdahulu mahkamah boleh diketepikan dalam satu tindakan yang baru.

(11) Sebagai satu perkara polisi kehakiman, seorang hakim tidak boleh dibenarkan membuka semula kes, mengenepikan penghakiman yang terdahulu ataupun memerintah dan menggantikan dengan penghakimannya sendiri. Seorang litigan tidak boleh menangguhkan point mengenai ketidaksahan untuk kegunaan akan datang tanpa menggunakannya di perbicaraan atau semasa rayuan darinya. (Peh Swee Chin HMP). Cuma kerana hakim kedua berpendapat bahawa perintah hakim pertama telah mengakibatkan ketidakadilan, tidak bererti bahawa satu perintah untuk mencelah boleh diberi. Kehendak-kehendak kaedah masih perlu dipenuhi.

(12) Dapatan-dapatan fakta oleh MR berhubung hak-hak Staghorn tidak menyokong ujian yang dipakai olehnya. MR jelas mendapati bahawa Staghorn telah melupuskan hak-hak dan kepentingannya dalam tanah tersebut. Oleh itu, Staghorn tidak boleh dikata sebagai telah memenuhi ujian mempunyai kepentingan untuk mencelah.

Oleh Abdul Aziz Mohamad HMP (menyetujui):

(1) Isu bidangkuasa di bawah A. 15 k. 6 KMT tidak bergantung kepada perkataan "Di mana-mana peringkat prosiding ..." sahaja. Bukan ungkapan ini sahaja yang menunjukkan bahawa perintah bagi menambahkan pihak dalam sesuatu kausa atau halperkara di bawah k. 6(2)(b) A. 15 boleh dibuat. Keseluruhan perkataan di dalam perenggan (b) juga menunjukkan demikian dan malah menunjukkan dengan lebih kuat lagi. Ia menunjukkan bahawa penambahan pihak adalah bertujuan untuk mencapai satu resolusi yang menyeluruh dan komprehensif terhadap kausa atau halperkara. Ungkapan melihat kepada keputusan masa hadapan kausa atau halperkara. Penambahan pihak adalah satu sumbangan kepada keputusan masa hadapan kausa atau halperkara. Ianya mengikut bahawa dari keseluruhan perkataan di perenggan (b), walau tanpa ungkapan "Di mana-mana peringkat prosiding ..." sekalipun, penambahan pihak hanya boleh dibuat dalam sesuatu kausa atau halperkara yang belum lagi diputuskan atau ditamatkan. Perkataan-perkataan perenggan (b) tidak membolehkan seorang untuk datang dan dijadikan pihak bagi menghapuskan apa yang sudahpun dibuat atau diputuskan dalam sesuatu kausa atau halperkara.

(2) Sebaik sahaja persoalan bidangkuasa di bawah A. 15 k. 6(2)(b) KMT disingkirkan, tiada apa lagi yang tinggal di dalam k. 6(2)(b) yang perlu dipertimbang berkaitan dengan pelaksanaan budibicara mahkamah. Oleh itu, MP tidak mungkin menghasratkan supaya persoalan budibicara dipertimbang di dalam ruang litup A. 15 k. 6(2)(b) tetapi sebagai satu pelaksanaan yang bebas bagi menghapuskan apa yang sudah dibuat di dalam prosiding saman pemula, iaitu, bagi mengenepikan perintah jualan yang telah dibuat dan disempurnakan dan jualan lelong yang sudahpun selesai.

(3) Kes *Pegang Mining* adalah berhubung pemakaian A. 16 k. 11 Kaedah-kaedah Mahkamah Agong 1957, precursor kepada aturan A. 15 k. 6(2)(b)(i) KMT. Ia memakai kaedah mahkamah untuk menambah pihak baru kepada kes semasa bagi membolehkan pihak baru tersebut melibatkan diri dalam proses untuk membawa kes kepada konklusinya yang adil dan memuaskan. Kes *Arab Malaysian* pula berhubung pemakaian A. 15 k. 6(2)(b) KMT dan ia digunapakai bagi membolehkan seseorang untuk mencelah di dalam kausa yang

telahpun diputuskan dengan tujuan untuk mengenepikan keputusan itu. Halperkara dalam kes tersebut adalah suatu hutang dan pencelah yang dicadangkan mempunyai kepentingan di dalamnya kerana beliau berjanji untuk membayarnya. Beliau dibenarkan untuk mencelah bagi mengenepikan hutang penghakiman kerana, jika tidak, beliau terpaksa menanggung faedah yang tinggi. Berdasarkan autoriti ini, pencelah yang dicadang hendaklah mempunyai kepentingan dalam halperkara kes. Jika beliau berhasrat untuk mencelah bagi mengenepikan suatu perintah jualan tanah beliau mestilah mempunyai kepentingan di dalam tanah. Jika beliau didapati tidak mempunyai kepentingan milikan dalam tanah, beliau tidak layak untuk mencelah. Ianya mengikut bahawa pihak yang hendak ditambah kepada sesuatu tindakan hendaklah mempunyai kepentingan yang mencukupi di dalam halperkara tindakan.

(4) MR memutuskan bahawa Staghorn telah dengan betulnya dibenarkan untuk mencelah oleh kerana Staghorn menuntut bahawa hak-haknya akan terjejas oleh mana-mana penghakiman yang dibuat di dalam prosiding kes ini. Kes-kes *Pegang Mining*, *Arab Malaysian* and *Gurtner v. Circuit* menunjukkan bahawa kepentingan seorang bakal pencelah di dalam halperkara tindakan hendaklah dibuktikan wujud. Beliau tidak boleh dibenarkan untuk mencelah cuma atas tuntutan bahawa beliau mempunyai kepentingan di dalam halperkara. "Pendekatan flexibility" yang disebut di dalam *Pegang Mining* bukan bermaksud kelonggaran pada standard kelayakan untuk mencelah. Lebih penting lagi adalah dapatan positif MR bahawa Staghorn telah melupuskan hak-hak dan kepentingannya terhadap tanah kepada Teck Lay dan bahawa Teck Lay adalah pemilik benefisial tanah. Itu adalah dapatan fakta yang dibuat dengan mengambilkira semua keterangan dokumentari.

(5) Dengan mendapati bahawa keterangan menunjukkan bahawa Staghorn telah melupuskan kepentingannya di dalam tanah kepada Teck Lay, MR tentunya telah menolak dakwaan kosong Staghorn mengenai niatnya untuk menjual semula kepada Teck Lay. Setelah mendapati Staghorn tidak mempunyai kepentingan di dalam tanah, MR khilaf apabila merumuskan bahawa Staghorn telah dengan betulnya dibenarkan untuk mencelah.

(6) Subseksyen (1) s. 281 KTN bercakap mengenai pemilik berdaftar yeng menyerah-simpan geran hakmiliknya "sebagai jaminan untuk pinjaman" tetapi tidak mengenalpasti peminjamnya. Ia juga tidak menghadkan pinjaman kepada pinjaman kepada pemilik berdaftar. Pinjaman mungkin diberi kepada pihak ketiga. Di mana pinjaman adalah kepada pihak ketiga, ianya mesti mengikut bahawa di bawah sub-s. (2), penghakiman yang diperolehi adalah penghakiman terhadap peminjam pihak ketiga.

(7) Subseksyen (1) s. 281 KTN adalah suatu seksyen pembolehan. Ia membolehkan atau memberi kuasa kepada pemilik berdaftar untuk menyerah-simpan geran hakmiliknya dengan mana-mana orang atau pihak sebagai jaminan kepada hutang. Ia tidak menjelaskan prosedur untuk atau cara penyerah-simpanan. Ia tidak harus ditafsirkan sebagai mengkehendaki supaya pemilik berdaftar harus melakukan sendiri perbuatan menyerah-simpan. Yang penting ialah hasratnya. Jika ia berkehendakkan bahawa geran hakmilik diserah-simpan dengan seseorang atau satu pihak sebagai jaminan kepada hutang dan ia kemudian diserah-simpan, maka dialah orangnya yang melaksanakan kuasanya di bawah sub-s. 1. Beliau berhasrat untuk menyerah-simpan jika beliau memberikan arahan, memberi kuasa atau menyetujuinya. Ianya mengikut bahawa perbuatan sebenar penyerah-simpanan geran hakmilik boleh dibuat oleh seorang yang lain.

(8) Berdasarkan fakta kes, MR khilaf apabila menggunapakai *Badiaddin* bagi memutuskan bahawa perintah jualan serta jualan lelong boleh diketepikan *ex debito justitiae*. Kebergantungannya kepada *Badiaddin* adalah tersasul. Staghorn tidak harus dibenar untuk mencelah kerana objek pencelahan adalah mustahil untuk dicapai. Selain itu, dengan dapatan bahawa ia tidak mempunyai kepentingan di dalam tanah, ia tidak layak untuk mencelah.

[Rayuan Staghorn ditolak.]

Case(s) referred to:

Arab Malaysian Merchant Bank Berhad v. Dr A Jamaluddin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chan Yee v. Chan Yoke Fong [1990] 2 CLJ 737; [1990] 1 CLJ (Rep) 36 SC ***(refd)***

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
Gurtner v. Circuit [1968] 1 All ER 328 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***
Hong Leong Finance Bhd v. Staghorn Sdn Bhd [1995] 3 CLJ 368 CA ***(refd)***
Isaacs v. Robertson [1985] AC 97 ***(refd)***
Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Interverner) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***
Nite Beauty Industries Sdn Bhd & Anor v. Bayer (M) Sdn Bhd [2000] 6 CLJ (Supp) 151 HC ***(refd)***
Palaniappa Chetty v. Dupire Brothers & Another [1919] FMSLR 370 ***(refd)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors [1990] 3 MLJ 254 ***(refd)***
Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 CA ***(refd)***
Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 MLJ 63 SC ***(refd)***
Tong Swee King v. Pegang Mining Co Ltd & Ors [1967] 2 MLJ 214 ***(refd)***
United Asian Bank Berhad v. A Subramaniam (as the personal representative of Roshammah Samual (Deceased) & Ors [1994] 3 CLJ 681 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Malay Reservations Enactment (FMS Cap 142), s. 13
National Land Code, s. 218(1), (2), (3)
Rules of the High Court 1980, O. 13 r. 8, O. 14 r. 11, O. 15 rr. 6(2)(b)(i), (ii), O. 42 r. 13, O. 70 rr. 18(6), 20(9), O. 81 r. 7
Trade Descriptions Act 1972, s. 16
Transitional Rules 1963, r. 43

For Hong Leong Bank Bhd - Porres R Royan (Yoong Sin Min & TY Ma with him); M/s Shook Lin & Bok
For Staghorn Sdn Bhd - Yusuf Khan (KL Wong & Wee Su Lin with him); M/s Yusuf Khan & Fong
For Wong Bin Chen - S Sivaneindiran (KL Pang & Puteri Shahnaz Majid with him); M/s Cheah Teh & Su

[Appeal from Court of Appeal, Civil Appeal Nos: B-02-132-1995, B-02-183-1995, B-02-138-1995 & B-02-228-1995]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] It began on 11 April 1988 when Hong Leong Finance Berhad which subsequently became known as Hong Leong Bank Berhad (Hong Leong) filed an Originating Summons No. S6-31-

958-88 in the High Court at Kuala Lumpur, for an order for sale. (This originating summons was later registered at Shah Alam High Court as Originating Summons No. 24-391-1990). The defendants in the originating summons were Wong Cham Mew, Low Chin Pau as trustee of the Estate of Low How Siew, deceased, and Tech Lay Realty Sdn. Bhd. (in Liquidation) (Teck Lay Realty). The order for sale sought was in respect of land comprised in Certificate of Title No. 23316, Lot No. 1996, Mukim of Semenyih, which was held under Hong Leong's lien-holder's caveat, Presentation No. 4556/81 Jilid 9 Folio 196. This was sought to satisfy the sum of RM5.5 million due and owing by Park Avenue Homes Sdn. Bhd. (Park Avenue), the borrower, and secured by the said lien-holder's caveat.

[2] On 9 August 1991 Wan Yahya J (as he then was) made the order for sale. There was no appeal against the order for sale. Hence there was no grounds of judgment. The land was successfully auctioned on 16 November 1991. The certificate of sale was issued on 18 February 1992.

[3] On 4 Disember 1993 Staghorn Sdn Bhd filed a summons-in-chambers praying, first, that it be allowed to intervene in the proceedings and, secondly, that the order for sale dated 9 August 1991 and the auction sale of the said land on 16 November 1991 be set aside. The affidavit in support was affirmed by Set Kon Kim, as the managing director of Staghorn. (This Set Kon Kim was the very same person who had earlier signed the sale and purchase agreement, loan documents and correspondences by Teck Lee Realty and Park Avenue as director/managing director of each company respectively). On 30 January 1995, Faiza Tamby Chik J made the order allowing Staghorn to intervene in the proceedings. Against this order, Hong Leong appealed to the Court of Appeal in Civil Appeal No. B-02-132-1995 while Wong Bin Chen, the successful bidder at the auction sale and also an intervener appealed to the Court of Appeal in Civil Appeal No. B-02-138-1995.

[4] On 27 April 1995, Faiza Tamby Chik J made another order, in substance, setting aside the order for sale and granting other orders enumerated in the said order of 27 April 1995. Against that decision, Hong Leong appealed to the Court of Appeal in Civil Appeal No. B-02-183-1995. Likewise Wong Bin Chen appealed to the Court of Appeal in Civil Appeal No. B-02-228-1995.

[5] On 15 June 1995 the Court of Appeal (Zakaria Yatim, NH Chan and Mahadev Shanka JJCA) allowed Hong Leong's appeal in B-02-132-1995 and Wong Bin Chen's appeal in B-02-138-1995 on the ground that there was no proceeding in existence in the originating summons on 30 January 1995 when the order for intervention was made or even on 4 December 1993 when the summons seeking intervention was issued. – see [1995] 2 MLJ 847.

[6] Against this judgment of the Court of Appeal, Staghorn appealed to the Federal Court in Federal Court Civil Appeal No. 02-08-1996 (B). On 5 August 1997, the Federal Court (Hj. Azmi Dato' Hj. Kamaruddin FCJ, Gopal Sri Ram JCA and Haji Abu Mansor Ali JCA) made the following order:

> **MENDENGAR** Peguam-Peguam yang dinamakan di atas **MAKA ADALAH DIPERINTAHKAN** bahawa Rayuan ini dibenarkan **DAN ADALAH DIPERINTAHKAN SELANJUTNYA** bahawa Perintah Mahkamah Rayuan bertarikh 15hb. Jun 1995 didalam keempat-empat rayuan diketepikan dan Perintah Hakim Mahkamah Tinggi dipulihkan semula **DAN ADALAH DIPERINTAHKAN SELANJUTNYA** bahawa Rayuan Responden ke Mahkamah Rayuan di dalam Rayuan Sivil B-02-132-95, B-02-183-95, B-02-138-95 dan B-02-228-95 ini diserahkan balik ke Mahkamah Rayuan bagi perbicaraan atas kesemua isu-isu yang berada di hadapan Mahkamah Rayuan dalam Rayuan-rayuan Sivil No. B-02-132-95 disatukan bersama B-08-183-95 dan B-02-138-95 disatukan bersama B-02-228-95 termasuk penggunaan budibicara Mahkamah kecuali atas isu bidangkuasa di bawah Aturan 15, Kaedah 5, Kaedah-Kaedah Mahkamah Tinggi 1980. (emphasis added)

[7] In other words, the appeals were reverted back to the Court of Appeal for it to hear and determine on all issues including the exercise of the court's discretion but excluding the issue of jurisdiction under O. 15 r. 6 of the RHC 1980.

[8] So, the appeals came to the Court of Appeal for the second time. (I shall skip what happened at the Court of Appeal regarding the preliminary objection which I shall deal with later.) On 25 October 2004 after hearing the appeals, the Court of Appeal made the following orders:

(i) That the appeal by Hong Leong in Civil Appeal No. B. 02-132-1995 and the appeal by Wong Bin Chen in Civil Appeal No. 02-138-1995 be dismissed;

(ii) that in respect of the appeal by Hong Leong in Civil Appeal No. B.08-183-1995 and the appeal by Wong Bin Chen in Civil Appeal No. B-02-228-1995:

(a) paragraphs (i) (ie, the setting aside of the order for sale) and (ix) (ie, the order regarding costs) of the order dated 27 April 1995 made by the learned High Court judge be affirmed;

(b) all other orders made in the same order ie, paras. (ii) to (ix) of the order set aside;

(c) the stakeholder, Ms. Wong Kim Lin, do forthwith deliver to Hong Leong the issue document of title of the said land.

[9] From that decision there are three appeals to this court:

(1) Civil Appeal No. 02-14-2005(B) by Hong Leong regarding the intervention by Staghorn (Civil appeal No. 02-132-1995 in the Court of Appeal) and regarding the setting aside of the order for sale (Civil Appeal No. B-02-183-1995 in the Court of Appeal).

(2) Civil Appeal No. 02-15-2005(B) by Wong Bin Chen, also on the issue of intervention by Staghorn (Civil Appeal No. 02-138-1995 in the Court of Appeal) and regarding the setting aside of the order for sale (Civil Appeal No. l B-02-228-1995 in the Court of Appeal).

(3) Civil Appeal No. 02-17-2005(B) by Staghorn against part of the orders made by the Court of Appeal on 25 October 2004.

[10] This court, on 24 August 2005, had granted leave to all the parties on the following questions:

1. In proceedings for an order for the sale of land [pursuant to a lien-holder's caveat]:

(a) Whether the Court, after the order for sale is made, may permit or allow a party which is found to have no proprietary rights in the said land, to intervene in the said proceedings with a view to setting aside the said order;

(b) Whether an order for sale may be set aside on the application of an intervener who is found to have no proprietary interest in the said land and in the absence of any challenge by the registered proprietor and/or the beneficial owner of the said land.

2. Whether sections 281(1) and 330 of the National Land Code (NLC) envisage that a registered proprietor of land may deposit his issue document of title as security for a loan only to the said proprietor and never to a third party.

3. If a registered proprietor of land deposits his issue document of title as security for a loan to a third party, whether the judgment that is required to be obtained under section 281(2) of the NLC is a judgment to be obtained against the borrower of the loan or against the registered proprietor of the said land.

4. Does section 281(1) of the NLC require as a condition precedent for validity of a lien holder's caveat that the registered proprietor do personally effect the deposit of his issue document of title or would the requirements of section 281(1) of the NLC be satisfied by evidence that the said issue document of title had been deposited by a third party (ie, a person or party other than the registered proprietor) on the instructions or with the authorization or the consent of the registered proprietor.

5. Is an order for sale made pursuant to a lien-holder's caveat created by the deposit of the issue document of title by a third party with the consent of the registered proprietor considered to be illegal and consequently liable to be set aside.

Preliminary Objection

[11] I shall first deal with the preliminary objections raised by Staghorn before this court. The notice of preliminary objections contains three objections. However, as the learned counsel for Staghorn submitted on the first objection only, I shall only reproduce that particular objection which reads:

> The appeal was not properly before the Court of Appeal being incompetent by reason that the previous panel of the Court of Appeal had vide order dated 5th May 2003 dismissed with costs the notices of motion dated 2nd August 2001 filed in Civil Appeal No. B-02-132-1995 and dated 31st July, 2001 in Civil Appeal No. B-08-183-1995 wherein the Appellant (Hong Leong Bank Bhd) in the present appeals had applied to include the orders of

A the High Court appealed against, *viz* dated 30th January 1995 allowing the Respondent to intervene in the proceedings before it and that dated 27th April, 1995 which set aside the order of sale and the auction sale and granted consequential orders to Staghorn.

B **[12]** We dismissed the preliminary objection and proceeded to hear the appeal proper. It must be remembered that when the appeals were heard for the first time by the Court of Appeal, no objection was raised. When the appeals were heard by this court for the first time, no objection was raised. Only when the Court of Appeal heard the appeal for the second time, ie, on 26 July C 2001, did Staghorn raise the preliminary objection that the records of appeal (of the Court of Appeal) were incomplete because the orders appealed against were not included in the records of appeal even though the draft orders were included.

D **[13]** On 31 July 2001, when the appeals came up for hearing again but before a different panel, Hong Leong filed a separate application in the respective appeals for leave to include the two orders of the High Court. The Court of Appeal dismissed the applications but ordered Hong Leong to file one record only in E Civil Appeal No. B-02-132-1995 for all the four appeals. Hong Leong did so and included the two orders in the appeal record filed by it. On 24 February 2004, the Court of Appeal heard the appeals. On 25 October 2004, when the Court of Appeal sat to continue with the hearing of the appeals Staghorn objected to the F inclusion of the two orders. However, the Court of Appeal refused to entertain the objection and proceeded to hear the appeals and gave its decision on the appeal.

[14] Now, when the appeals were fixed for hearing in this court, G learned counsel for Staghorn raised the same objection again.

[15] I consider the current objection by Staghorn as an abuse of the process of the court. The complaint is about the inclusion of the orders in the record of appeal of the Court of Appeal, not the H record of appeal of this court. In the circumstances, I do not think it is proper for the learned counsel for Staghorn to raise it again here by way of a preliminary objection. It is true that the applications to include the orders in the appeal record of the Court of Appeal were dismissed by the Court of Appeal. I However, the court made a further order for Hong Leong to file a fresh appeal record in one of the appeals only. I do not see anything improper for Hong Leong, when filing the new appeal record as directed by the court, to include the orders. No one

was prejudiced. Indeed, the complaint should have been made if they were not included. Even if they were not included, I would not consider it a miscarriage of justice even if the Court of Appeal were to receive it from the bar when the appeal was heard. It is too trivial a matter to be made an issue about, what more to dismiss the appeals for, without hearing them.

Intervention By Staghorn

[16] As has been pointed out, the appeals by Hong Leong and Wong Bin Chen, respectively, are, first, on the granting of leave to intervene and, secondly, on the setting aside of the order for sale. This judgment only concerns the granting of leave to intervene. We have also seen that the only question posed to this court that concerns leave to intervene is question 1(a). There are two limbs to that question, ie, whether:

(a) after the order for sale has been made;

(b) a party which is found to have no proprietary rights in the said land may be allowed to intervene in the said proceedings with a view to setting aside the said order for sale.

[17] Even though I was a member of the panel that granted leave and approved the questions drafted by learned counsel for the appellants, now, having heard the full arguments in the appeals, having read the appeal record and the written submissions, having done my own research on the law, I am afraid that I will have to address some very basic questions first, even though they are not part of the questions framed for this court to answer. These questions relate to the scope of O. 15 r. 6(2) of the Rules of the High Court 1980, (RHC 1980), the decisions of the courts in this country on applications for leave to intervene, the approach taken by Faiza Tamby Chik J when he granted the leave, the first judgment of the Court of Appeal, the decision of this court when the appeals came up before it for the first time and the approach taken by the Court of Appeal in its second judgment on the issue of leave to intervene. I am of the view that I have to state what the law is. If this court were to remain silent about it and only deals with the issues posed to this court, I fear that it would appear as if this court agrees with the approach taken by Faiza Tamby Chik J, disagrees with the first judgment of the Court of Appeal, as a matter of law agrees with the contrary view assumed to have been taken by this court on that judgment (I say "assumed" because no judgment was given by this court when it

allowed the appeal regarding intervention earlier)and also agrees with the approach taken by the second Court of Appeal in its second judgment on the issue of intervention. The net effect would be that a party may intervene even after an order has been made, perfected and executed, even where the court has been *functus officio* and even where the judge hearing the application to intervene as if he were hearing an appeal is of the opinion that the order of the first judge is wrong in law. In my view, such a state of affairs is quite disturbing and the issue should be considered in depth. For this reason, I am constrained to address the issue in detail even though it is not framed as a question for us to decide, which is quite understandable, in view of the approach taken by both Faiza Tamby Chik J and the second Court of Appeal. However, it is the core question in an application to intervene.

[18] I have mentioned that the Court of Appeal when hearing the appeals for the first time, on 15 June 1995, allowed Hong Leong's and Wong Bin Chen's appeals purely on the ground that the High Court (Faiza Tamby Chik J) should not have allowed the intervention because, even at the time when the summons seeking intervention was issued (14 Disember 1993) there was no longer any proceeding in existence since not only the order for sale had been made, the order perfected and the auction sale completed, but even the certificate of sale had been issued.

[19] However this court disagreed and remitted the appeals back to the Court of Appeal for further consideration on all issues including the exercise of the discretion under O. 15 r. 6(2) of the RHC 1980 but excluding the issue of jurisdiction under the said rules. Unfortunately this court did not give its grounds for the ruling.

[20] That ruling certainly binds the Court of Appeal. It also binds this court, as far as this case is concerned. In the absence of the ground of judgment, it is not absolutely clear what it means. However, considering that jurisdiction was the only issue upon which the first Court of Appeal decided the appeals, I can only conclude that what this court meant was that this court did not agree with the Court of Appeal that an application to intervene may not be made when there is no longer a proceeding in existence. In other words, the words "At any stage of the proceedings" in O. 15 r. 6(2) include even after the proceedings have concluded, in this case after the order for sale had been

made and perfected, the auction sale had been completed and the certificate of sale had been issued. If that is what that order means, without the grounds of judgment to support it, I am afraid, it becomes our duty to look at it closely, consider it, decide on it and give our reasons for it. (However, I must make it clear here that my view on that specific issue will not affect this case. This case is bound by the decision given by this court in the earlier appeal, on that particular issue.)

[21] Let us now take a close look at the provision of O. 15, in particular r. 6(2). The first thing to be remembered about this provision is that it is a procedural provision regarding "misjoinder and non-joinder of parties", as the heading states.

[22] Rule 6(2) provides:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely -
>
> (i) ...
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

[23] Logically, all these happen at a very early stage of a proceeding and before trial. Secondly, this is a general provision applicable in all civil proceedings whether in a writ action, summons, motion, petition and so on. It is not a provision that applies specifically in an application for an order for sale under the National Land Code.

[24] Thus, in *Chan Yee v. Chan Yoke Fong* [1990] 2 CLJ 737; ([1990] 1 CLJ (Rep) 36 (SC), Lee Hun Hoe CJ (Borneo) at pp. 740-741 (p. 40) said:

A The main object of the rule is to prevent multiplicity of proceedings. Under the rule the court has a very wide discretion to make the order that he made so that all matters in dispute could be effectively and completely determined and adjudicated upon.

B **[25]** It should be noted that in that case, two motorcycles were involved in an accident resulting in the death of the pillion rider. After the appellant/plaintiff who was the father of the deceased pillion rider sued the respondent/defendant for damages, the respondent/defendant applied by summons for leave to bring in C one Lee Hoy Mun as a co-defendant under the said rule. Clearly that was done before the trial.

[26] In *Shell Malaysia Trading Sdn. Bhd. v. Leong Yuet Yeng & Ors.* [1990] 3 MLJ 254 the plaintiff filed a suit against the defendants D as co-administrators of an estate. As the grant had not been extracted, the plaintiff proceeded to enter judgment in default of defence against the defendants in their personal capacity. When the grant was finally extracted, the third defendant was replaced as co-administrator by one Lim Chin Hoe. The plaintiff then E applied to amend the judgment and all pleadings and documents filed by changing the name of the third defendant to that of Lim Chin Joo. The application was made under O. 15 r. 6 of the RHC 1980. Gunn Chit Tuan J (as he then was) *inter alia*, held that "O. 15 r. 6 must necessarily only apply to proceedings where the F substitution of any of the parties to the cause or matter was made **before** final judgment." (emphasis added).

[27] The Court of Appeal judgment in *Tai Choi Yu v. Syarikat Tingan Lumber Sdn. Bhd.* [1998] 4 CLJ 293 is directly on point. G There, an application was made by a summons-in-chambers to intervene in a suit where a default judgment has already been entered against the defendant. Again the application was made under O. 15 r. 6(2) of the RHC 1980.

[28] The Court of Appeal held: H

(1) Although O. 15 r. 6(2)of the Rules of the High Court 1980 states that an application to intervene could be made 'at any stage of the proceedings', this does not mean that such application can be made after final judgment had been I entered. In the present case, the applicant took out the application after judgment had been perfected (see pp. 2771 and 278A-C); *Shell Malaysia Trading Sdn. Bhd. v. Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 followed.

[29] In *Nite Beauty Industries Sdn. Bhd. & Anor. v. Bayer (M) Sdn. Bhd.* [2000] 6 CLJ (Supp) 151, Bayer, an unsecured creditor, who was bound by the scheme of arrangement and compromise approved by an order of court, applied to be added as a party to the proceedings before the court and also to declare, *inter alia*, the order a nullity. The application was also made under O. 15 r. 6(2) of the RHC 1980. Jeffrey Tan J, *inter alia* held:

> (3) Although O. 15 r. 6(2) states that such an application could be made at any stage of the proceedings, its scope should be limited to an application made before final judgment had been entered and not after because the proceedings would then have come to an end. Thus the would-be intervener who will be directly affected, either legally or financially, by any order which may be made in the action, must intervene before that order is perfected and whilst the court is still not *functus officio*. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999, thus the court no longer has any jurisdiction to make any order under O. 15 r. 6(2) (see pp 318H-319B, E, I).

[30] Thus, we see that our courts have been very consistent regarding the scope of the application of this rule. This is very sensible as the words "At any stage of the proceedings ..." necessarily mean that there is a proceeding pending. Once the judgment is entered, the proceeding has come to an end. Furthermore, O. 15 is concerned with the very early stage of a proceeding, to have all the necessary parties in before the trial begins. Thus, r. 8 provides that, when the order under r. 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance. All these happen before the trial.

[31] Another point to note is this, para. (3) of r. 6 also provides:

> (3) An application by any person for an order under paragraph (2) adding him as a party must, except with leave of the Court, be supported by an affidavit showing his interests in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

[32] The provision categorically states that at that early stage, all that the applicant has to do is to show by way of affidavit that "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter." The court decides whether or not to exercise the discretion to allow or not to allow him to intervene based on affidavit evidence alone, because the evidence has not been adduced since the trial has not started.

[33] The cases of *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52, PC and *Arab Malaysian Merchant Bank Berhad v. Dr. A. Jamaluddin bin Dato Mohd. Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC, were relied on by the learned High Court judge, and also the Court of Appeal. I agree with the principles laid down by those two cases as to how the discretion should be exercised.

[34] But, first, let us look at *Pegang Mining (supra)* more closely. (I am also referring to the judgments of the learned judges of the Federal Court which were reported under the name of *Tong Swee King v. Pegang Mining Co. Ltd. & Ors.* [1967] 2 MLJ 214). Confining myself to the facts relevant to the present discussion, one Choong Sam (the respondent in the Privy Council) was given the right to work the mining lands which Tong Swee King (the appellant in the Federal Court) had derived through two agreements. It was Choong Sam who had requested Tong Swee King to bring the action in the High Court against *Pegang Mining* (the respondent in the Federal Court and appellant in the Privy Council) and who had undertaken to indemnify Tong Swee King against all costs and expenses arising therefrom. After the High Court had given judgment in favour of *Pegang Mining*, *Tong Swee King* filed a notice of appeal to the Federal Court against the whole of the decision given against her. Then, by an agreement made in secret between *Pegang Mining* and *Tong Swee King*, the latter accepted RM10,000 from Pegang Mining as payment for not proceeding with her appeal. Under those circumstances, Choong Sam applied to the Federal Court for leave to intervene praying that his name or the 2nd respondent's name be substituted for that of Tong Swee King on record.

[35] The Federal Court, by a majority allowed the application, and the decision was affirmed by the Privy Council.

[36] It is important to note that at that point of time, the Federal Court (Civil Appeals) (Transitional) Rules 1963 (L.N. 242/63) (the Transitional Rules 1963) contained the following provision in r. 43:

> 43. Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or Judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.
>
> (This rule later became rule 84 in the Rules of the Federal Court 1980 (P.U.(A) 33/80) and rule 71 in the Rules of the Federal Court 1995).

[37] It is surprising that the judgments of the Federal Court made no reference to that rule. The judgments of the Federal Court also made no reference to O. 16 r. 11 of the Rules of the Supreme Court 1957 ("RSC 1957") (now O. 15 r. 6 of the RHC 1980). The editor of the Malayan Law Journal added the reference "RSC 1957, O. 16") in the summary of the headnote. However, the judgment of the Privy Council did mention O. 16 r. 11 of the RSC 1957 but not r. 43 of the Transitional Rules 1963.

[38] The fact remains that at that point of time when the Federal Court and the Privy Council decided *Pegang Mining (supra)*, r. 43 of the Transitional Rules 1963 was in existence and it was that rule that governed the application to intervene in the Federal Court. However, if an application to intervene is made in the High Court as in this case the governing provision is O. 15 r. 6(2) of the RHC 1980. The main difference is that an application under O. 15 r. 6(2) of the RHC 1980 may be made "at any stage of the proceedings", which words were/are not to be found in the rules applicable to the Federal Court. In any event, in *Pegang Mining (supra)*, the application was made before the appeal was heard by the Federal Court. So, while the Privy Council in *Pegang*

Mining (supra) laid down the principles as to how the discretion to allow or not to allow intervention is to be exercised, *Pegang Mining (supra)* said nothing about at what stage a party may be allowed to intervene if the application were made in the High Court.

[39] All that I need to say about *Arab Malaysian (supra)* is that in that case the application to intervene was made to set aside a judgment obtained in default of appearance. There is a specific provision for that in O. 13 r. 8 of the RHC 1980. However, the Supreme Court did not refer to that provision but decided on the provision of O. 15 r. 6(2) of the RHC 1980, without saying anything regarding at what stage intervention may be allowed. Again, while the principle regarding the exercise of the discretion to allow to intervene, following *Pegang Mining (supra)*, is valid, Arab Malaysian is no authority regarding at what stage intervention under O. 15 r. 6 of the RHC 1980 may be allowed.

[40] *Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1992] 2 MLJ 63 SC (see also High Court judgment reported in [1989] 2 MLJ 298) is no authority regarding at what stage an application to intervene may be made. There, the application was to intervene to set aside an *ex parte* order pursuant to s. 16 of the Trade Descriptions Act 1972. There was no discussion at all on the phrase at "any stage of the proceedings". Indeed the Supreme Court judgment made no reference at all to O. 15 r. 6(2) of the RHC 1980.

[41] The learned author of the *Malaysian High Court Practice* Vol. 1 under the heading "[15.6.2] When and how application to be made" says:

> Although no limit is placed on time within which an application may be made for an order, it should be made as soon as possible to avoid inconvenience.

[42] So, when we talk about as soon as possible at any stage of the proceedings it must necessarily mean that even if the proceedings are still pending, it must be made as soon as possible.

[43] Considering all these authorities, my conclusion is that an application to intervene under O. 15 r. 6(2) of the RHC 1980 must be before judgment. To set aside an order or judgment, there must be a provision in the Rules that can be relied on for the purpose. This is provided for in O. 42 r. 13 of the RHC 1980:

13. Setting aside or varying judgments and orders (O. 42 r. 13)

Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[44] Examples of such provisions are O. 13 r. 8, O. 14 r. 11, O. 70 r. 18(6) and 20(9) and O. 81 r. 7 of the RHC 1980. In other cases, setting aside may only be done by a fresh action – see *Hock Hua Bank Bhd. v. Sahari bin Murid* [1980] 1 LNS 92.

[45] Let us now look at cases involving challenges to an order for sale by a person not already a party to the proceedings leading to the order for sale being made who intervenes in order to set aside the order for sale.

[46] Before going any further, it must be remembered that where a non-party tries to intervene in the proceedings, he must necessarily do so under O. 15 r. 6 of the RHC 1980. There is no other provision under the National Land Code ("NLC") or any other law or rule for him to rely on. So, like interveners in other civil proceedings, he too must comply with the provisions of O. 15 r. 6 of the RHC 1980.

[47] I shall take the cases in chronological order.

[48] In *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 FC, (I am quoting the headnote):

The learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous order. The learned judge thereupon set aside his order. The appellant appealed.

Held: (1) the learned judge was *functus officio*;

(2) the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is

A necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced B at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set C aside the order on the ground of fraud.

[49] In this case, O. 15 r. 6 of the RHC 1980 was not an issue as the application was made by a party to the proceedings, not by an intervener. Thus, the Federal Court approached the matter D from the angle of *functus officio*.

[50] In *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21, FC it was held:

(1) as soon as the Collector made the first order under section E 263 of the National Land Code he was *functus officio* save as to his power under section 264(3) to postpone the sale ordered or to formally rectify the first order within the purview of section 33 with no power to make another order or subsequent order of sale under section 263;

F (2) the second order on which the respondent relied was no order at all and was a nullity and devoid of any effect.

[51] Again, this case did not concern O. 15 r. 6 of the RHC 1980 as there was no application to intervene since the applicant G was already a party to the proceedings. Secondly, even though the second collector did not set aside the first order for sale, by issuing the second order for sale, the first order was suspended. This the Federal Court held the collector had no power to do as he was *functus officio*.

H **[52]** Unfortunately, very often no one pays any attention to the real decision of the court. What is often quoted is the passage on an order which is a nullity.

[53] In *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, I Interverner)* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222, MUI Bank applied for and obtained an order for sale. After several unsuccessful attempts to auction the land, the land was eventually

sold to one Ng Choon Meng. The full purchase price was paid and the registrar issued the certificate of sale by the court. In the meantime, the respondent (the debtor) had approached a buyer (the intervener) for the land and offered to sell the land to him. The offer was accepted by the intervener and MUI Bank consented to the sale on terms. Subsequently, the intervener applied to court to intervene in the said proceedings. The learned judge allowed the application and ordered, *inter alia*, that the public auction of the land be set aside. The Supreme Court, reversing the judgment of the High Court, *inter alia*, held:

> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly *functus officio* by then. Indeed, following *Hock Hua Bank Bhd. v. Sahari bin Murid*, the learned judge was *functus officio* after he made the order for sale on 29 August 1998. In the *Hock Hua* case, the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was *functus officio* after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

[54] It is to be noted that even though in this case the application to set aside the order for sale was made by an intervener (not a party in the original proceedings), the judgment made no reference to O. 15 r. 6 of the RHC 1980. The court instead approached it from the angle of *functus officio*. It may well be that at that stage, leave was no longer an issue. It may also be that to lawyers who argued the case and to the court too the two approaches ie, at any stage of the proceedings and *functus officio* would, in substance, be similar and would lead to the same result. However, in my view, it would be clearer to everybody's mind if, in an application to intervene by a non-party, the focus is on O. 15 r. 6 of the RHC 1980. On the other hand, where the application to set aside an order is made by an existing party, then the court considers whether the judge is *functus officio*.

[55] In *United Asian Bank Berhad v. A. Subramaniam (as the personal representative of Roshammah a/p Samual (Deceased) & 4 Ors.* [1994] 3 CLJ 681, an order for sale was made and an auction date was fixed. Two days before the sale was to take place, the intervenors, the children of the borrower, filed an application for the sale to be stayed pending the disposal of their application to be substituted or added as defendants. They claimed that the order for sale was unlawful. The court granted the stay and the intervenors were added as defendants. The question before the court was whether, in the light of the issues raised by the defendants, their application to set aside the order for sale should be allowed. Mahadev Shanker J, (as he then was) dismissed the application to set aside the order for sale. However, in his judgment, he did touch on intervention under O. 15 r. 6(2)(b)(i) and (ii) of the RHC 1980. This is what the learned judge said:

> The order for sale which the intervenors are now seeking to set aside is a final order unless appealed against. Once it was made, drawn up and perfected this Court is *functus officio* and has no power to set it aside. It was so held by the Supreme Court in *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervenor)* [1992] 4 CLJ 2229. In that case the public auction was completed. Thereafter the registered owner purported to sell the land to the intervenor. To that extent the facts can be distinguished because in our case the intervenors sought to come in two days before the sale actually took place. Should they have been permitted to do this? I hope enough has been said to demonstrate the conclusion that this purported intervention should never have seen the door of this court.
>
> Intervention to be legitimate must qualify with the conditions prescribed by O. 15 r. 6 2(b)(i) or (ii) of the Rules of the High Court 1980. It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted. Secondly a person can only be regarded as a proper party if his presence before the Court is imperative for the adjudication. In a general sense what this means is that the intervenor must have a direct legal or financial interest in the action.

[56] This, as far as I can find, is the clearest, most direct and accurate observation regarding intervention to set aside an order for sale. I agree with the learned judge entirely.

[57] What conclusions can be drawn from the provisions of O. 15 r. 6 of the RHC 1980 and the cases discussed above? I think, they are as follows:

[58] First, an application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is *functus officio*.

[59] Secondly, an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O. 15 r. 6 of the RHC 1980. The application may be made "at any stage of the proceedings" meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge has also become *functus officio*. Even then, the application must be made promptly. Order 15 r. 6 of the RHC 1980 applies to all civil proceedings whether commenced by a writ, motion or summons etc.

[60] Thirdly, an application for leave to intervene is supported by an affidavit. In other words, in such an application, the judge merely decides on affidavit evidence, whether or not leave should be granted. At that stage, the judge should not make a definite finding of facts which, as envisaged by O. 15 r. 6 of the RHC 1980, will and can only be made after all evidence has been adduced in the trial which will follow subsequently.

[61] Fourthly, any party, whether a party in the original proceeding or not, who wants to challenge the order for sale, or for that matter, any judgment, other than a default judgment or where it is specifically provided for in the rules, may only do so by filing a fresh action.

[62] Fifthly, while the principles laid down in *Pegang Mining* as to exercise of discretion are applicable, all the requirements of O. 15 r. 6(2) must be satisfied.

[63] What happened in the instant case? The application to intervene was made about one year and ten months after the date of the issuance of the certificate of sale, about two years after the successful auction and about two years and three months after the order for sale was made.

[64] What did the learned High Court judge decide? On 30 January 1995, ie, three years and five months after the order for sale was made, he allowed Staghorn to intervene. The judgment runs into 55 pages, just on the application for leave to intervene.

[65] From the judgment, it can be seen that, while the learned Judge did refer to O. 15 r. 6 of the RHC, he failed to consider the opening words "At any stage of the proceedings". He straight away relied on *Pegang Mining (supra)* and *Arab Malaysian (supra)* for the principles applicable. As I have said, while the principle laid down in *Pegang Mining (supra)* as to exercise of discretion are applicable, the learned judge should have addressed the first point first ie, whether there was a proceeding in existence for Staghorn to intervene in. Only if there was a proceeding still pending, would the principles in *Pegang Mining (supra)* become applicable. Had the learned judge referred to the judgments that I have mentioned earlier, he would have seen straight away that it was too late for Staghorn to apply to intervene. That would have put an end to the matter.

[66] Of course, the learned Judge did discuss the issue of *functus officio*. However, he held that the issue of *functus officio* "which was correctly applied in *Mui Bank (supra)*" (to translate his words) was not applicable in this case. He said that in *Mui Bank (supra)*, the order for sale could not be challenged because it was made in compliance with all statutory provisions. On the other hand, in the instant case, the order for sale was not obtained in strict compliance with the statutory provisions, *inter alia*, s. 281(2) and (3) of the NLC. The learned judge then devoted more than thirty pages of his judgment to this and came to the following conclusions:

(1) Hong Leong's lien-holder's caveat was not valid.

(2) Third party charge by Teck Lay Realty was not valid and wrong in law.

(3) The memorandum of transfer of Teck Lay Realty was not valid and wrong in law.

[67] The learned judge in para. 32 of his judgment then said this:

> In this case the court is not *functus officio* and as such the court is competent to set aside the orders that were invalidly obtained; consequently all the orders and even the sale conducted thereunder must be set aside.

[68] The following points should be made. First, the learned judge did not consider at all the opening words of O. 15 r. 6(2) ("At any stage of the proceedings ..."). He did consider the issue of *functus officio*. However, in considering whether the court was

functus officio, he did not ask himself the question whether the final order had been made and perfected. Instead, he went at great length to consider whether the order for sale was validly made as if he was sitting in this court or the Court of Appeal hearing an appeal on merit against the order for sale. Having held that the order for sale was wrong in law and should be set aside, he held that the judge that made the order for sale was not *functus officio* and allowed Staghorn to intervene.

[69] With respect, the approach is clearly wrong. In an application to intervene by a non-party in a proceeding all that a judge has to do is, first, to determine whether there is a proceeding still pending. Where a final order, in this case the order for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O. 15 r. 6(2)(b)(ii) of the RHC 1980.

[70] Secondly, even in considering whether or not to grant the intervention, assuming that there was still a proceeding in existence, all that the judge should do was to be satisfied that the applicant has shown that "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter ...". This is done on affidavit evidence. The judge is not called upon and should not make a definite finding of facts or law based on the facts which, by right, had not been adduced yet.

[71] Thirdly, in an application to intervene under O. 15 r. 6 of the RHC 1980, the issue of *functus officio* merges with the issue whether there is any proceeding still in existence. It is another way of looking at the same thing. The issue is whether the final order has been made and perfected, not whether the judge is of the opinion that the order made by the earlier judge is, in his view, right or wrong in law.

[72] Fourthly, the learned judge merely mentioned O. 5 r. 6 of the RHC 1980. He did not direct his mind to its provisions and asked himself the question whether each of the requirements of the rule has been complied with. Instead, he jumped straight to and quoted the Supreme Court Practice and the principles laid down in *Pegang Mining (supra)* and said that the test had been followed by the Supreme Court in *Arab Malaysian (supra)*. The provisions of the rule were ignored.

[73] I come now to the judgment of the Court of Appeal. Here, I shall only deal with the first part of the judgment ie, on intervention. First, the Court of Appeal took into account the restriction imposed on it by this court, which, I must say, it correctly understood when it said:

> Faced with this situation, we comprehend that the restriction placed upon us by the Federal Court is only confined to the issue of there being no proceedings in existence after the Order for Sale and thus the Court had no jurisdiction thereafter to make any order under O. 15 r. 6(2).

[74] However, as will be elaborated later, the Court of Appeal missed one point, that is the part of the order that says "termasuk budibicara mahkamah" (including the exercise of the court's discretion). That was not excluded by the Federal Court. The Court of Appeal would still have to determine whether the High Court, in granting the leave to intervene, had exercised its discretion correctly.

[75] The Court of Appeal then cited passages from *Pegang Mining (supra)* and *Arab Malaysian (supra)* as the authority without analyzing the facts and the circumstances surrounding the cases and held that the "learned judge in considering this application before him to intervene was firmly in grip of the aforesaid tests." Of course, the learned judge too had cited the two cases, but also without analyzing them. The Court of Appeal then went on to consider the issue of *functus officio* which, in its view, was "materially different from the previous ruling of there being no proceedings in existence" and therefore, not prevented by the order of this court of 5 August 1997. The Court of Appeal, following *Mui Bank Bhd. (supra)*, without really saying so, did conclude that the learned judge was *functus officio* and therefore had no power to set aside the order for sale. But it did not stop there. It went on to apply the "exception" made in *Badiaddin bin Mohd. Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, because, as found by the learned High Court judge (Faiza Tamby Chik J), the order for sale made by the earlier judge (Wan Yahya J) contravened a substantive statutory provision ie, s. 281(1) and (2) of the National Land Code. First, the mandatory requirement for the creation of the lien holder's caveat was not complied with since it was Teck Lay Realty or its solicitors and not the registered proprietor who had deposited the document of title of the said land with Hong Leong. Secondly, the loan was for the nominee of Teck Lay Realty, again not the registered proprietor.

Thirdly, judgment was obtained by Hong Leong against the borrower (Park Avenue) instead of the registered proprietors. As a result the order for sale was tainted with illegality. The Court of Appeal then concluded:

> When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid down in *Mui Bank Bhd. v. Cheam Kim Yu (supra)*, and set aside, *ex debito justitiae*, the Order for Sale under the rule expressed in *Badiaddin bin Mohd. Mahidin v. Arab Malaysian Finance Bhd. (supra)*.
>
> With these, we find that Staghorn has a right to apply to intervene ... .

[76] I have the following comments to make about the judgment of the Court of Appeal on intervention.

[77] First, while, as directed by this court (even though in my view wrongly) the Court of Appeal rightly refrained from considering whether there was a proceeding still in existence, the Court of Appeal failed to focus its mind on the provision of O. 15 r. 6(2) of the RHC 1980 and ask itself the question whether the learned High Court judge had himself addressed his mind to the said provision in the exercise of his discretion to grant the leave to intervene. Just because the Court of Appeal found the learned High Court judge had cited *Pegang Mining (supra)* and *Arab Malaysian (supra)* it concluded that the learned High Court Judge "was firmly in grip with the aforesaid test". It failed to consider whether "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter." Instead, like the learned High Court judge, the Court of Appeal had placed the cart before the horse by deciding that the order for sale was wrongly made and therefore leave to intervene should be granted. That was not what it should consider, at least not at that stage. It should consider whether the requirements of the rule have been satisfied. How does one say that there is an issue that "would be just and convenient to determine" when the order had been made, perfected and carried out completely? There is simply no more issue left to be determined in that proceeding.

[78] Instead of focusing on the provision of O. 15 r. 6 of the RHC 1980, both the Court of Appeal and Faiza Tamby Chik J focused on the order for sale to see whether it was validly made

or not. Having found, at that stage, that it was not validly made, then relying on *Badiaddin (supra)*, it allowed the application to intervene.

[79] It is not my intention to make a detailed analysis or give any final opinion on *Badiaddin*'s case *(supra)*, except to make a few points. First, in *Badiaddin (supra)*, the appellants commenced a fresh action to have the second order of the High Court declared null and void and to have it set aside on the ground that it contravened the provisions of s. 13 of the Malay Reservations Enactment (FMS Cap. 142.) This court in that case was dealing with the inherent jurisdiction of the court to set aside a final order. The judgment of this court on that issue was a split decision: Mohd. Azmi FCJ and Gopal Sri Ram JCA were of the view that it could be done while Peh Swee Chin FCJ disagreed. Even Azmi FCJ talked about the "extraordinary circumstances" of the case and said that "the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction." The learned judge further added that "The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice."

[80] On the contrary, here we are dealing with an application to intervene under O. 15 r. 6 of the RHC 1980. The consideration is the provision of that rule itself, whether the application satisfies the requirement of the rule. So, *Badiaddin (supra)*, at that stage, is not relevant. So, even if *Badiaddin (supra)* is good law, it is not relevant in an application to intervene under O. 15 r. 6 of the RHC 1980. It is, as in that case, relevant in considering whether the previous order of the court could be set aside, in a fresh action.

[81] Secondly, it is one thing for the apex court to look at the order of a lower court and say that the order is null and void because it contravenes a written law, especially as in *Badiaddin* (supra) where the contravention is glaring. But, let us reverse the position. Let us assume that a case has reached the Federal Court and that the Federal Court has made an order. Subsequently, the losing party commences a fresh action in the High Court to set aside the order on the ground of illegality for contravention with a written law. Following *Badiaddin (supra)* and the dictum in *Eu*

Finance Bhd. (supra) the High Court would be at liberty to reopen the case, declare the Federal Court order null and void and set it aside! I dread to think of such a situation.

[82] Even where it involves a judgment of a court of co-ordinate jurisdiction, a second judge scrutinizing an earlier judgment or order of another judge may easily find a point which he disagrees with, even in law. Maybe that point was not even raised or argued before the first judge. As a matter of judicial policy, should the second judge be allowed to reopen the case, set aside the earlier judgment or order and substitute it with his own? If he can do it, why can't a third judge do the same with the second judge's order, and so on? That will encourage "judge shopping." The same process can also happen at every level of the court system.

[83] The abuse voiced by Peh Swee Chin FCJ eg, where he said "Further, a point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom" should not be taken lightly. That is exactly what had happened in this case.

[84] Even in applying the principles laid down in *Pegang Mining (supra)*, the Court of Appeal appears to be only concerned with the dicta of Lord Diplock which it quoted, that "… one of the principal objectives of the rule is to enable the court to prevent injustice being done to a person whose rights **will be affected** by its judgment **by proceeding to adjudicate** upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for flexibility of approach ..." (emphasis added).

[85] The Court of Appeal also quoted the passage on "the test" expressed by the Privy Council which I would also like to reproduce here before I give my comment:

> A better way of expressing the test is: **will** his rights against or liabilities to any party to the action in respect of the subject-matter of the action be directly affected by any order which **may** be made in the action. (emphasis added)

[86] The first point to note is that, bearing in mind the words underlined, it is very clear that Lord Diplock was talking about a future order that may be made in the action. This is consistent with the provision of O. 15 r. 6 of the RHC 1980 as I have discussed at length earlier. Furthermore, as has been pointed out

earlier, in that case, the application to intervene was made before the Federal Court heard the appeal and made any order and there was a provision for that in the Transitional Rules 1963.

[87] Secondly, "to prevent injustice being done" is not the only consideration. It is "one of the principal objectives", even in the words of Lord Diplock. That does not mean that just because the second judge is of the view the order of the first judge had caused injustice, the order to intervene should be given. The requirements of the rule still have to be satisfied.

[88] Thirdly, the finding of facts of the Court of Appeal regarding the rights of Staghorn does not seem to support the test that it applies. The judgment of the Court of Appeal clearly says (here, I am afraid I have to refer to the second part of the judgment):

> ... we are not in agreement with the learned Judge in ordering the handing over of the document of title to Staghorn, **more so** declaring Staghorn as the "rightful true beneficial owner of the said land". All documentary evidence concludes that **Staghorn has divested its rights and interest in the said land to** the 3rd defendant (Teck Lay Realty – my addition) ... To accede to the demand of Staghorn for the return of the document of title, is, in our view, inequitable and without logic, and to register Staghorn as the registered proprietor is far fetched when evidence positively identifies the 3rd. defendant as the beneficial owner of the land that is to be changed to the Plaintiff (Hong Leong – my addition) ... . (emphasis added).

[89] So, if Staghorn has divested its rights and interest and has no beneficial interest in the said land, how does Staghorn satisfy the test?

[90] In the final analysis, in this case, we have the following scenario.

Judge No. 1 High Court (Wan Yahya J)

[91] On 9 August 1991, Wan Yahya J heard the application for an order for sale, gave his decision, made the order prayed for, which had been perfected, and the auction was successfully carried out on 16 November 1991.

Judge No. 2 High Court (Faiza Tamby Chik J)

[92] There was an application to intervene before Faiza Tamby Chik J pursuant to O. 15 r. 6(2) RHC 1980. What the learned Judge should have done was to consider (1) whether there was a

proceeding still pending; (ii) whether the requirement of para (ii) of r. 6(2) of O. 15 RHC 1980 was fulfilled. He may apply the principles laid down in *Pegang Mining (supra)*. That was all.

[93] Instead he failed to pay attention to the provisions of O. 15 r. 6(2). Thus he did not consider at all whether there was proceeding still pending. He did not consider whether it was convenient to have the issues determined as between the parties. Instead, he examined the order made by Wan Yahya J as if he was hearing an appeal, decided that the order for sale made by Wan Yahya J contravened the provisions of s. 218 of the National Land Code and therefore wrong in law, and, because of that, granted leave for Staghorn to intervene.

Court Of Appeal No. 1

[94] That short judgment of the Court of Appeal dated 15 June 1995 had hit the nail on the head. It was absolutely correct. At that point of time when the application to intervene was made, there was no longer any proceedings in existence. So, the application was not made at any stage of the proceedings.

Federal Court No. 1

[95] This court when hearing the appeals the first time, on 5 August 1997 reversed the judgment of the Court of Appeal No. 1 sending the appeals back to the Court of Appeal to hear all issues including the exercise of the discretion but excluding the jurisdiction of the High Court No. 2 under O. 15 r. 6(2) of the RHC 1980. Unfortunately no reasoned judgment was given.

Court Of Appeal No. 2

[96] The Court of Appeal was right when it took the view that because of the order of this court, it was not open to it to consider the issue whether there was a proceeding still pending when the application to intervene was made. But it failed to realize that that was the only issue that was not open for it to consider. All the other requirements of O. 15 r. 6 of the RHC 1980 must still be considered. But, like Faiza Tamby Chik J, it did not. Instead, like Faiza Tamby Chik, purporting to rely on *Badiaddin (supra)*, it held that the order for sale was wrongly made and, because of that, allowed Staghorn to intervene.

[97] I am of the view that both Faiza Tamby Chik J and the Court of Appeal had misdirected themselves in their judgments to allow Staghorn to intervene. This is in spite of taking into account the order of this court hearing the appeal for the time which I hold to be binding on the Court of Appeal in this case.

[98] In the circumstances, in my judgment, the appeals against the order for leave to intervene in Civil Appeals No. 02-14-2005(B) and 02-15-2005(B) should be allowed. As a consequence, the appeals against the setting aside of the order for sale should also be allowed as the orders cannot stand anymore. Both appellants are entitled to their costs in their respective appeals in this court and in the courts below. Further, Staghorn's appeal in Civil Appeal No. 02-17-2005(B) should be dismissed with costs in this court and in the courts below. The deposits paid in respect of Civil Appeals 02-14-2005(B) and 02-15-2005(B) should be refunded to Hong Leong and Wong Bin Chen respectively and the deposit paid in respect of Civil Appeal No. 02-17-2005(B) should be paid to Hong Leong on account of taxed costs.

[99] My brother Azmel Haji Maamor FCJ has read this judgment in draft and agreed with it. My brother Abdul Aziz Mohamad FCJ also agrees with the conclusions and the orders mentioned in the preceding paragraph. However he will issue a separate judgment. In the circumstances, this court unanimously orders accordingly.

Abdul Aziz Mohamad FCJ:

[100] These three consolidated appeals concerned a piece of land in Semenyih of approximately 116 acres which, by a sale and purchase agreement ("SPA") dated 27 February 1981, its two registered proprietors agreed to sell, and Staghorn Sdn Bhd ("Staghorn") agreed to purchase, for RM3,024,110. Upon, or about the time of, execution of the SPA, Staghorn paid the vendors RM302,411, ten per centum of the purchase price. By cl. 5 of the SPA, upon payment of the full purchase price, the vendors were to execute a valid and registrable memorandum of transfer in favour of Staghorn or its nominee. On account of the agreed purchase, Staghorn had a private caveat registered against the land on 5 March 1981.

[101] It turned out that the party in whose favour the vendors were to execute the memorandum of transfer pursuant to their obligation under cl. 5 of the SPA was Teck Lay Realty Sdn Bhd ("Teck Lay"), a sister company of Staghorn's, which the vendors

regarded, as one would ordinarily and naturally do, as Staghorn's nominee under that clause. To pay for the balance of the purchase price, RM2,721,699, Teck Lay sought a loan from Bank Bumiputra Malaysia Berhad ("BBMB"), which on 2 July 1981 offered a loan of RM2,720,000 to Teck Lay. As security, BBMB required a first legal charge on the Semenyih land, besides a second legal charge on a piece of land in Kuala Lumpur belonging to Park Avenue Homes Sdn Bhd ("Park Avenue"), Teck Lay's holding company, which was already charged to BBMB for some other sum. Earlier, on 1 July 1981, a directors' resolution of Teck Lay had been passed, offering a first legal charge over the Semenyih land as security for the loan. Having obtained the loan, before 6 July 1981 Teck Lay paid the balance of the purchase price to the vendors, who thereupon executed the memorandum of transfer, undated, in favour of Teck Lay and delivered it and the issue document of title to the land to their solicitors, John Ang & Jega, who forwarded them to Teck Lay. John Ang & Jega were also Park Avenue's solicitors.

[102] On 28 October 1981, Hong Leong Finance Berhad ("Heong Leong") approved a loan of RM5.5 million to Park Avenue. As security, Hong Leong required third-party legal charges on the Semenyih land and another land. On the same day a directors' resolution of Teck Lay was passed, offering a first legal charge over the Semenyih land, which the resolution said was Teck Lay's property, as security for the loan.

[103] On 2 November 1981 Park Avenue forwarded the issue document of title to the Semenyih land to Hong Leong's solicitors, for the purpose of enabling Hong Leong to enter a lien-holder's caveat in respect of the land. Park Avenue would have obtained the issue document of title from Teck Lay, which had not yet got onto the title as the registered proprietor and therefore could not yet create a third-party legal charge in respect of the land in favour of Hong Leong as required by Hong Leong. Hence the need for Hong Leong to enter a lien-holder's caveat in respect of the land. On the same date, Staghorn applied to withdraw the private caveat that it had caused to be registered against the land on 5 March 1981 and Hong Leong applied for the entry of a lien-holder's caveat in respect of the land. The withdrawal of Staghorn's private caveat and the entry of Hong Leong's lien-holder's caveat were effected simultaneously on 4 November 1981.

[104] The creation and effect of liens are provided for by s. 281 of the National Land Code, sub-s. (1), (2) and (3) of which provide as follows:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.
>
> (3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and sections 266 to 269 shall apply, *mutatis mutandis*, where any such application has been made as they apply where a chargee applies for an order under section 256.

The word "proprietor" in sub-s. (1) means the registered proprietor, who in this case were the two vendors. The particular section in Chapter 1 of Part Nineteen under which to apply for the entry of a lien-holder's caveat is s. 330, sub-s. (1) of which provides as follows:

> (1) Any person or body with whom the issue document of title to any land, or any duplicate lease, has been deposited as security for a loan may, as provided in section 281, apply to the Registrar under this section for the entry of a lien-holder's caveat in respect of the Land or lease in question.

Hong Leong made the application under s. 330 as a body with whom the issue document of title to the land had been deposited as security for a loan, as provided in sub-s. (1)(a) of s. 281. The withdrawal of Staghorn's private caveat was obviously to enable Hong Leong's lien-holder's caveat to be registered, because according to sub-s. (3) of s. 330 Staghorn's private caveat would have prohibited the Registrar of Titles from entering Hong Leong's

lien-holder's caveat on the register document of title. Upon the entry of the lien-holder's caveat, Hong Leong, by virtue of sub-s. (1)(b) of s. 281, became entitled to a lien over the land.

[105] On 8 November 1981 John Ang & Jega, acting for Park Avenue, forwarded the memorandum of transfer of the Semenyih land, duly executed by the vendors and Teck Lay, to Hong Leong's solicitors. On 9 November 1981, pending presentation and registration of the memorandum of transfer, by which the land would get to be registered in its name, Teck Lay executed a charge-in-escrow of the land in favour of Hong Leong.

[106] On 12 November 1981 BBMB, because Teck Lay had not yet executed a charge of the Semenyih land in its favour as a security for the loan of RM2,720,000 given to Teck Lay, lodged a private caveat against the land. Because of BBMB's caveat, the transfer of the land from the vendors to Teck Lay, for which the memorandum of transfer came to be dated 24 November 1981, and the charge of the land by Teck Lay to Hong Leong, could not be registered, so that the vendors remained as the registered proprietors of the land and, in respect of the land, Hong Leong only had its lien under s. 281 as security for the loan to Park Avenue.

[107] Park Avenue subsequently defaulted in the repayment of the loan and on 13 September 1983 Hong Leong obtained judgment against it. With that, by virtue of sub-s. (2) of s. 281, Hong Leong became entitled to apply for an order for sale of the land, which it did by originating summons to the High Court at Shah Alam on 11 April 1988. In its affidavit in support of the originating summons, Hong Leong, *inter alia*, said that the vendors were the registered proprietors of the land, that by an agreementdated 27 February 1981 they had agreed to sell the land to Staghorn, but that, pursuant to the agreement, Staghorn had nominated Teck Lay as the transferee of the land. To Hong Leong, therefore, the only persons who could have an interest in the land, besides itself, were the two vendors and Teck Lay, which was then in liquidation, and these accordingly were made defendants in the application. Hong Leong also said that as regards BBMB, which had lodged a private caveat against the land, there had been litigation between it and BBMB, which had been settled and compromised.

[108] The defendants were duly served with the cause papers. None of them opposed the application. At the hearing of the originating summons on 9 August 1991 the vendors were absent, but Teck Lay was represented by the Official Receiver and Liquidator. On that date an order for sale by public auction was made. At the public auction on 16 November 1991 the land was sold to Wong Bin Chew @ Ng Chi Leong ("Wong"), to whom a certificate of sale was issued on 18 February 1992.

[109] On 4 December 1993 Staghorn filed the application that led to these three appeals. It was an application by summons in chambers in Hong Leong's originating summons for the order for sale, by which Staghorn sought (i) leave to intervene in the originating summons proceedings, (ii) orders that the order for sale of 9 August 1991 and the auction sale of 16 November 1991 be set aside, and (iii) delivery of the issue document of title to the land to Staghorn.

[110] As to interest in the land, in its affidavit in support of the application Staghorn claimed that it was at all material times the purchaser of the land, that it was "supposed to resell" to Teck Lay the land, which "was to be the subject of a third party charge to secure a loan" given by Hong Leong to Park Avenue, but the sale by Staghorn to Teck Lay "did not materialize but was aborted and Staghorn remains the beneficial owner of the said land". As to the object to be achieved by intervening, Staghorn said that it was "to question the validity of the Order of sale ... which contravenes s. 281 of the National Land Code 1965 and is therefore void rendering the sale by auction ... to be also void and of no effect".

[111] On 30 January 1995 the High Court granted Staghorn's prayer (i) for leave to intervene, which in his judgment the learned judge (Faiza Tamby Chik J) said was leave under O. 15 r. 6(2)(b) of the Rules of the High Court 1980. Hong Leong and Wong filed separate notices of appeal to the Court of Appeal against the decision of 30 January 1995. On 27 April 1995 the High Court granted Staghorn the other two prayers, that is, prayer (ii) for setting aside of the order for sale and the auction sale, and prayer (iii) for the delivery of the issue document of title to Staghorn. The High Court also made six other orders not specifically prayed for in Staghorn's application. One was an order declaring that Staghorn was the rightful true beneficial owner of the land, one was an elaboration of the order for the delivery of the issue

document of title to Staghorn and the others were orders aimed at reinforcing and fortifying Staghorn's title to the land. Hong Leong and Wong filed separate notices of appeal to the Court of Appeal against the decision of 27 April 1995.

[112] The four appeals to the Court of Appeal were consolidated and on 15 June 1995 the Court of Appeal (Zakaria Yatim, NH Chan, Mahadev Shankar JJCA) allowed Hong Leong's appeals with costs and dismissed Wong's appeals with no order as to costs. The Court of Appeal set aside the orders of the High Court of 30 January 1995 and 27 April 1995 and ordered that the issue document of title to the land be returned to Wong. The grounds of the Court of Appeal are given in *Hong Leong Finance Bhd v. Staghorn Sdn Bhd* [1995] 3 CLJ 368. The grounds were written as relating to Hong Leong's appeal against the leave to intervene given on 30 January 1995 and as grounds for the Court of Appeal's setting aside of the order granting leave to intervene. The Court of Appeal considered O. 15 r. 6(2)(b), which provides as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) …
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

The Court of Appeal held that since an order under O. 15 r. 6(2)(b) could only be made "At any stage of the proceedings" and since the proceedings under the originating summons in this case were no longer in existence after the issue of the certificate

of sale on 18 February 1992, the High Court had no jurisdiction on 30 January 1995 to make any order under O. 15 r. 6(2)(b). Staghorn appealed to this court.

[113] On 5 August 1997 this court (Mohd Azmi FCJ, Gopal Sri Ram, Abu Mansor JJCA) allowed Staghorn's appeal, set aside the orders of the Court of Appeal of 15 June 1995 and reinstated the orders of the High Court, and ordered that the four appeals be remitted to the Court of Appeal for hearing of all the issues before it in the four appeals, "termasuk penggunaan budibicara mahkamah kecuali atas isu bidangkuasa di bawah A. 15 k. 6 (including the exercise of the court's discretion except the issue of jurisdiction under O. 15 r. 6).

[114] Now the issue of jurisdiction under O. 15 r. 6 does not hang upon the words "At any stage of the proceedings" alone. It is not those words only that indicate that an order for the addition of a party in a cause of matter under r. 6(2)(b) is to be made only in a cause or matter that is extant and alive. The entire wording of para. (b) also so indicates, and with greater force. It shows that the addition of a party is intended to achieve a comprehensive and global resolution of the cause or matter. The wording looks to the future outcome of the cause or matter. The addition of the party to be added is a contribution to the future outcome. It follows from the entire wording of para. (b), even without the words "At any stage of the proceedings", that the addition of a party can only be made in a cause or matter that has not been concluded and brought to an end. The wording of para. (b) would not enable a person to come in and be added as a party to undo what has already been done or decided in a cause or matter. It seemed to me therefore that when this court excluded the issue of jurisdiction under O. 15 r. 6 from the consideration of the Court of Appeal, while asking it to consider the question of the exercise of the court's discretion, this court could not have intended that the question of discretion be considered within the terms of O. 15 r. 6(2)(b). Once the question of jurisdiction under O. 15 r. 6(2)(b) is excluded, there will be nothing left in the wording of r. 6(2)(b) to be considered in relation to the question of the exercise of the court's discretion. It was as if this court was saying that the question whether Staghorn, in the exercise of the court's discretion, ought or ought not to be allowed to come in to have the order for sale and the auction sale set aside ought not to be considered within the confines of O. 15 r. 6(2)(b), which would amount to saying that

Staghorn's application to "intervene" ought not be considered strictly as an application to be added as a party under O. 15 r. 6(2)(b), but simply as an application at large to be allowed to come in to undo what had already been done in the originating summons proceedings, that is to say, to have the order for sale that had been made and perfected and the auction sale that had been completed, set aside.

[115] The Court of Appeal (Arifin Zakaria, Mohd Ghazali Yusoff JJCA, James Foong J) decided the four appeals on 25 October 2004. The judgment of the court was delivered by James Foong J (now JCA). In considering the appeals of Hong Leong and Wong against the order allowing Staghorn to intervene, the Court of Appeal looked at only four cases. Those apparently were the only cases that Hong Leong, Wong and Staghorn between them cited to the Court of Appeal on the question of intervention. Those were also the only cases that were directly cited, in relation to the question of intervention, in these three appeals. Before I proceed to set out the manner in which the Court of Appeal decided the four appeals, I think it is convenient that I say what needs to be said about these four cases.

[116] In *Pegang Mining Co. Ltd. v Choong Sam & Ors* [1969] 2 MLJ 52, a company held mining leases over four parcels of land which it had sub-let to sub-lessees. An agreement was made in 1931 between the company, the sub-lessees and another person, which provided that the sub-lessees should grant sub-sub-leases of the four parcels to that other person ("the sub-sub-lessee") for her to mine. The agreement contemplated the acquisition by the company of mining leases over other parcels of land. In 1959 mining leases over certain other parcels of land ("the disputed parcels") in the vicinity of the four parcels were granted to the company. The sub-sub-lessee, after obtaining sub-sub-leases of two of the four parcels, entered into a contract with a contractor by which she granted him liberty to win minerals from the two parcels and deliver them to her for sale, out of the proceeds of which he was to be entitled to 85 1/2 %. On 12 July 1963 the contractor entered into an agreement with the sub-sub-lessee under which he undertook to be responsible for any costs incurred by her in enforcing her rights under the agreement of 1931 by arbitration or litigation, and she agreed that the final decision whether or not to appeal against any order arising out of the arbitration or litigation should rest with the contractor. On 27 July 1964 she agreed with the contractor to use her best endeavours to obtain from the

company and the sub-lessee mining rights over the areas contemplated by the 1931 agreement and to grant to the contractor the liberty to win minerals, on the same terms as those in the contract relating to the two parcels, from the lands over which the mining rights were obtained.

[117] In July 1964 the sub-sub-lessee brought an action against the company and the sub-lessees under the 1931 agreement, to which the contractor was not a party, claiming that under the 1931 agreement the company was obliged to grant sub-leases of the disputed parcels to the sub-lessees and the sub-lessees were obliged in turn to grant sub-sub-leases of the disputed parcels to the sub-sub-lessee. She lost in the High Court and gave notice of appeal to this court, but subsequently, in breach of her agreement with the contractor of 12 July 1963 and contrary to his express instructions, she entered into an agreement with the company whereby the company bought her off for RM10,000, and she gave notice discontinuing her appeal. Thereupon the contractor, who was not a party to the action or the appeal, applied to this court to be added as a party to the appeal, and on that application this court ordered that the contractor and the sub-lessees (who, although defendants in the High Court and respondents in the appeal, sided with the sub-sub-lessee on her claim) be substituted for the sub-sub-lessee as appellants and the sub-sub-lessee be added as a respondent alongside of the company. The company appealed to the Privy Council, whose opinion, that the appeal ought to be dismissed, was delivered by Lord Diplock.

[118] Although the problem was one of the addition of a party to an appeal to this court, the rule that the Privy Council considered was the rule about the addition of a party to an action in the High Court, namely, O. 16 r. 11 of the Rules of the Supreme Court 1957, which have been repealed by the present Rules of the High Court 1980. This was because, as Lord Diplock said at p. 55B (right), this court had the same power to add a party to an appeal as the High Court had under that rule to add a party to an action. The relevant part of O. 16 r. 11 was as follows:

> The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order … that the names of any parties, whether plaintiffs or defendants,

> who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

It was very much akin to the present O. 15 r. 6(2)(b), sub-para. (i). Like O. 15 r. 6(2)(b), it was a rule for the addition of a party to a cause or matter that was yet to be adjudicated. This can be readily seen from the words of the adjectival clause "who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter" describing the party to be added, which Lord Diplock said at p. 55 C (right) the party to be added must be in order to come within the words of the rule. There were also the words "at any stage of the proceedings" which existed in the rule as they exist in O. 15 r. 6(2)(b). Order 16 r. 11 was not intended to enable a party to be added to a cause or matter that had been adjudicated in order to upset the decision that had been made in it.

[119] Lord Diplock cited the aforesaid adjectival clause in relation to the company's alternative ground of appeal that this court had no jurisdiction to add the contractor as a party because he had no interest in the subject matter of the proceedings, the subject matter being, as Lord Diplock said at p. 56 C-D (left), the interests of the company, the sub-lessees and the sub-sub-lessee in the disputed parcels. Speaking of the voluminous judicial exegesis to which those words had been subject, Lord Diplock said at p. 55 G-I (right):

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

It should be noted from the passage that the rule is about joining an additional party to "an existing action".

[120] For it to be said that his "rights will be affected" by the judgment of the court, the party to be added must of course have an interest in the subject matter of the action. At p. 56 B (left) Lord Diplock expressed the test for the interest in the following words: "will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?" My understanding of the decision of the Privy Council is that the contractor's rights against the sub-sub-lessee, a party to the action, in respect of the subject matter of the action, namely the interests of the parties to the action in the disputed parcels, would be directly affected by the outcome of the action, or rather, as matters now stood, of the appeal to this court. This is in view of what Lord Diplock said at p. 55 F-I (left):

> If the appeal succeeds therefore the result will be that the company will be compelled to execute sub-leases of the disputed parcels to the sub-lessees, and the sub-lessees will be compelled to accept such sub-leases and to execute sub-sub-leases of the disputed parcels to the sub-sub-lessee … Once the sub-sub-leases were granted the contractor would be entitled under the agreement contained in the letter of 27th July 1964 to enter upon the disputed parcels and win the minerals thereon.

The contractor's interest in the subject matter of the action derived from his agreement of 27 July 1964 with the sub-sub-lessee under which he would have a right as against the sub-sub-lessee to win minerals from the disputed parcels once the sub-sub-lessee was granted sub-leases over the disputed parcels. It was an interest that was found to be established in fact and in law.

[121] In *Arab Malaysian Merchant Bank Bhd v. Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27, the appellant bank had, in a civil suit, obtained judgment in default of appearance against a company and an individual for a certain sum with interest at 0.5% per day from 1 April 1984 until realization. The rate of interest of 0.5% per day was apparently the contractual rate and not the rate laid down in O. 42 r. 12 of the Rules of the High Court 1980. The respondent gave an undertaking to the bank to settle the judgment debt by instalments of so much per month in consideration of the bank's refraining from enforcing the judgment against the judgment debtors. After sometime the respondent was unable to keep up with the instalment payments and the bank brought an action against him for breach of undertaking. The respondent sought to be made a party to the bank's suit against

the judgment debtors in order to have the judgment in default set aside on the ground that the judgment gave interest that far exceeded the rate allowed by O. 42 r. 12. The application was apparently made under the present O. 15 r. 6(2)(b) although the suit had already been adjudicated and was in that sense no longer in existence. The High Court allowed the respondent to intervene and be made a party. The bank appealed to the Supreme Court, which dismissed the appeal.

[122] It does not appear from the report that in the Supreme Court the bank raised the point that an application to be added as a party in order to have the decision in the action set aside did not come within the scope of O. 15 r. 6(2)(b). What appears to have been contended for the bank was that the judgment debtors themselves had not applied to have the judgment set aside and that, as for the respondent, he should instead have applied for the setting aside of his undertaking. Counsel for the bank also referred to the test, that I have set out, that Lord Diplock laid down in Pegang Mining for the interest that a person intending to be added as an additional party to an action must have in the subject matter of the action, and contended that the learned judge had applied the wrong test, but it is not apparent from the judgment of the Supreme Court in what manner it was contended that the judge had applied the wrong test.

[123] The decision of the Supreme Court was based on the decision of the UK Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, "the effect of which", the Supreme Court (Guan Chit Tuan SCJ) said, "is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket". The following passage from the judgment of Lord Denning MR, at p. 332 B-C, was cited:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome.

Gunn Chit Tuan SCJ concluded:

> In our present case, we considered that the respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside.

That the respondent "would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside" was a definite finding.

[124] It must be pointed out that, like Pegang Mining, where it was considered, *Gurtner v. Circuit*, where Lord Diplock was also a member of the appeal tribunal, was also a case of an application to be added as a party to an existing action that had not been adjudicated and that the application was made under the English O. 15 r. 6(2)(b), in which the words that fell to be considered by the Court of Appeal were "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon", which are the words in our O. 15 r. 6(2)(b), sub-para. (i), and which Lord Denning said were substantially the same as in the old English O. 16 r. 11 (and in our old O. 16 r. 11 that featured in Pegang Mining), adding, as regards any difference in wording, that nothing turned on it. The passage from Lord Denning's judgment that I have set out was his manner of giving "a wide interpretation" to those words in the English O. 15 r. 6(2)(b) which are also in our O. 15 r. 6(2)(b), sub-para. (i), although the Supreme Court appears to have thought that the passage would be relevant to our O. 15 r. 6(2)(b), sub-para. (ii).

[125] Just to show that *Gurtner v. Circuit* was an application to be added as a party to a case that had not been adjudicated, I will give a brief outline of the case. The plaintiff Gurtner brought a running down action against the defendant Circuit. The defendant could not be traced. An order for substituted service was obtained for service on him by service on an insurance company which did not know the whereabouts of the defendant. The writ was served on the insurance company. Fearing that judgment would go against the defendant by default unless something was done, the Motor Insurers' Bureau applied to be added as defendants in the action. Their interest in the action lay in the fact that, as stated at p. 331 F-G, "they had entered into an agreement with the Minister of Transport by which they

promised to pay any judgment against a motorist if it was not satisfied by his insurers within seven days". They wanted to defend the action in order to avoid or mitigate any liability that they might incur arising from the agreement. Lord Denning said at p. 332 G: "It is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants". It was a definite finding of their interest in the subject matter of the action.

[126] MUI *Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 was a case of a charge action brought by originating summons in which the chargor bank obtained in the High Court an order for sale of a land charged to it as security for a loan. The land was duly sold by public auction and the certificate of sale was issued to the successful bidder. A week after the issue of the certificate for sale, an application was made by summons in chambers under the originating summons by a person to whom, while the charge action had been going on, the chargor-borrower, the respondent in the originating summons, had agreed with the bank's consent to sell the land, to intervene in the charge action to have the order for sale set aside. It is not stated in the judgment whether the application was made under O. 15 r. 6(2)(b). The judge granted the person leave to intervene and ordered the public auction sale of the land to be set aside. On appeal by the bank, the Supreme Court held that once the order for sale was made, drawn up and perfected, as it was, the judge was *functus officio* and therefore had no power to set aside the order for sale.

[127] In the *MUI Bank* case, the Supreme Court followed the decision of this court in *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92, in which the respondent to a charge action denied executing the charge but nevertheless the High Court made an order for sale of the land in question. The respondent did not appeal against the order but later, after the order had been drawn up, applied by notice of motion in the charge action to have the order for sale set aside on the ground that he did not execute the charge. The judge set aside his own order. On appeal by the chargee bank, this court (Chang Min Tat FJ), allowing the appeal, said:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court … unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment … .

[128] In *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, Mohd Azmi FCJ said that there was one special exception to the rule, as laid down in the *Hock Hua Bank* case, that, as he put it, "one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction", and the special exception "is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction …". He referred to the Privy Council case of *Isaacs v. Robertson* [1985] AC 97, where, he said, Lord Diplock "upheld" the existence of a category of orders of the court which, in Lord Diplock's words, "a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court …". Azmi FCJ also said that the Privy Council, through Lord Diplock, "also emphasized that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules or natural justice'". With orders made in contravention of a written law particularly in mind, Mohd Azmi FCJ went on to say:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be

> exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[129] I will now relate the manner in which the Court of Appeal dealt with the appeals before them. The Court of Appeal dealt first with the question, which the High Court decided on 30 January 1995 and which was the concern of the first set of appeals by Hong Leong and Wong, whether Staghorn was to be allowed to intervene under O. 15 r. 6(2)(b) and cited the passages that I have set out from Lord Diplock's judgment in the *Pegang Mining* case, saying after that that the principles in those passages were reaffirmed by the Supreme Court in the *Arab Malaysian Merchant Bank* case. The Court of Appeal then said:

> After perusing the High Court judgment of 30.1.1995, we are of the view that the learned Judge in considering this application before him to intervene was firmly in grip of the aforesaid tests. But what is challenged by [Hong Leong] and [Wong] before us is the right of Staghorn to apply for intervention when the Order for Sale has been granted, the public auction successfully completed, and the Certificate of Sale issued by the High Court. By these, the High Court was *functus officio* in hearing enclosure 77.

[130] It would appear from that passage that, in the Court of Appeal, although Hong Leong and Wong contended that, even going by *Pegang Mining* and *Arab Malaysian Merchant Bank*, Staghorn was not qualified to intervene for not possessing sufficient interest to intervene, what was more important to Hong Leong and Wong was that, even if Staghorn was qualified to intervene, it ought not have been allowed to intervene because the object of the intervention, to set aside matters that had become final, was incapable of being attained, being barred by the *"functus officio"* rule. The *functus officio* question was in fact said by Staghorn's counsel to us to be the linchpin of the appeals of Hong Leong and Wong to the Court of Appeal.

[131] The Court of Appeal considered that the restriction in this court's order of 15 June 1995 did not prevent them from considering the issue of *functus officio*, then looked at the *MUI Bank* case, which decided that an order that has been drawn up and perfected cannot be set aside, and then, noting the exception

to the rule that Mohd Azmi FCJ spoke of in *Badiaddin* in the passage that I have quoted, said that the facts in the instant case fell within the exception because there was "contravention of a substantive statutory provision", namely, s. 281 of the National Land Code.

[132] As to how the Court of Appeal considered that s. 281 had been contravened, the Court of Appeal, after saying that the rationale of the "requirements" of sub-ss. (1) and (2) of the section was well explained by Whitley JC in *Palaniappa Chetty v. Dupire Brothers and Another* [1919] FMSLR 370 and quoting the passage relied on, went on to say as follows:

> Thus it is material in the creation of a lien holder's caveat under section 281 NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to deal with the said land in the event of default in repayment of the loan which he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. Section 281 NLC is intended for a registered proprietor to raise money on loan, speedily, by depositing the document of title registered in his name with the lender as compared with the more complex process of registering a legal charge over the land. But as the law demands, it is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend [to] a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in section 281(2) NLC of a "holder of any lien has obtained judgment for the amount due to him" is clear to this effect for there can be no one else other than the registered proprietor who is the borrower.
>
> As disclosed, all these provisions were contravened in the creation of the lien holder's caveat and the subsequent remedies resorted. The registered proprietors did not borrow any money from [Hong Leong] nor did they deposit the document of title with [Hong Leong], and neither did [Hong Leong] obtain judgment on the amount due under the loan against them. When there were non compliance of the rules and procedure in the creation of the lien holder's caveat, and the fulfillment of the pre-condition

> for enforcement of the remedy subsequent to the failure in repayment of the loan, then the Order for Sale made in pursuant to section 281(2) NLC is tainted with illegality.
>
> When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid down in *MUI Bank Bhd v. Cheam Kim Yu (supra)*, and set aside, *ex debito justitiae*, the Order for Sale under the rule expressed in *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd (supra)*.

[133] That was immediately followed by the following conclusion:

> With these, we find that Staghorn has a right to apply to intervene. We also agree with the finding of the learned Judge in allowing Staghorn to intervene since Staghorn is claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard. As advised by the Privy Council in *Pegang Mining (supra)* a "flexibility of approach" must be adopted.

[134] It was a conclusion on Staghorn's right to intervene. The first sentence, as indicated by the words "With these", was a finding flowing from the finding on the contention of Hong Leong and Wong, or what from the judgment would appear to have been their contention, that Staghorn ought not to be allowed to intervene because the object of the intervention was barred by the rule against the setting aside of a final judgment. To rule on that contention, the Court of Appeal necessarily had to consider, in the intervention part of the appeal, whether s. 281 had been breached. The second sentence in that conclusion was a finding, made in reliance on *Pegang Mining*, that Staghorn had the requisite interest to intervene. It is the only place in the judgment where the Court of Appeal stated their reasons for being in favour of Staghorn on the question of interest to intervene. The words "since Staghorn is claiming that its rights would be affected by any judgment in the proceeding of this case" are particularly to be noticed. The Court of Appeal might be intending to say that such a claim by Staghorn was a reason why the High Court made the decision to allow Staghorn to intervene, and that they agreed with the reason. Or they might be intending to say that such a claim by Staghorn was a reason of theirs for agreeing with the High Court's decision to allow Staghorn to intervene.

[135] Having, when considering the question of intervention, decided the question of breach of s. 281 in favour of Staghorn and stated the consequences of the breach, there was practically

nothing left for the Court of Appeal to consider when they came to deal with the second set of appeals by Hong Leong and Wong, namely, the appeals against the order of the High Court of 27 April 1995 setting aside the order for sale and the auction sale. But the Court of Appeal disagreed with the orders for handing over the issue document of title to Staghorn and declaring Staghorn to be the true beneficial owner of the land and the other unsought-for orders. This is what the Court of Appeal said:

> Though we agree on the invalidity of the lien holder's caveat and the Order for Sale made thereunder, we are not in agreement with the learned Judge in ordering the handing over of the document of title to Staghorn, more so declaring Staghorn as the 'rightful true beneficial owner of the said Land' and instructing the document of title be registered in its name. In fact the two latter orders are not even requested by Staghorn in its application. There is no dispute that Staghorn paid 10% of the purchase price for the said land but it has nominated [Teck Lay] as the purchaser. All documentary evidence concludes that Staghorn has divested its rights and interest in the said land to [Teck Lay] who, in turn, had secured finances to pay off the balance of the purchase price to the vendors. In the course of this, the land is encumbered. To accede to the demand of Staghorn for the return of the document of title, is, in our view, inequitable and without logic, and to register Staghorn as the registered proprietor far fetched when evidence positively identifies [Teck Lay] as the beneficial owner of the said land that is to be charged to [Hong Leong]. Though [Hong Leong] is without the security of a lien holder's caveat, [Hong Leong] is not without interest over the said land for the loan granted to [Teck Lay's] nominee and registration of a first legal charge over the said land awaits [Teck Lay] to be registered as a proprietor.

The overriding statements in that passage are these important statements of finding: "All documentary evidence concludes that Staghorn has divested its rights and interest in the said land to [Teck Lay]" and "evidence positively identifies [Teck Lay] as the beneficial owner of the said land".

[136] The Court of Appeal accordingly affirmed the order setting aside the order for sale and the auction sale and the order for costs but set aside the other orders of the High Court and ordered the issue document of title, which was then in the custody of a stakeholder, to be returned to Hong Leong. The Court of Appeal's affirmation of the High Court orders granting leave to Staghorn to intervene and setting aside the order for sale

and the auction sale gave rise to an appeal by Hong Leong (No. 14) and an appeal by Wong (No. 15). The Court of Appeal's setting aside of the other orders of the High Court gave rise to an appeal by Staghorn (No. 17). The questions on which this court granted Hong Leong and Wong leave to appeal were common and were as follows:

1. In proceedings for an order for the sale of land [pursuant to a lien-holder's caveat]:

   (a) can the Court, after the order for sale is made, permit or allow a party which is found to have no proprietary rights in the said land, to intervene in the said proceedings with a view to setting aside the said order;

   (b) can an order for sale be set aside on the application of an intervener who is found to have no proprietary interest in the said land and in the absence of any challenge by the registered proprietor and/or the beneficial owner of the said land.

2. Whether Sections 281(1) and 330 of the National Land Code ("NLC") envisage that a registered proprietor of land may deposit his issue document of title as security for a loan only to the said proprietor and never to a third party.

3. If a registered proprietor of land deposits his issue document of title as security for a loan to a third party, whether the judgment that is required to be obtained under s. 281(2) of the NLC is a judgment to be obtained against the borrower of the loan or against the registered proprietor of the said land.

4. Does s. 281(1) of the NLC require as a condition precedent for validity of a lien-holder's caveat that the registered proprietor do personally effect the deposit of his issue document of title or would the requirements of s. 281(1) of the NLC be satisfied by evidence that the said issue document of title had been deposited by a third party (i.e. a person or party other than the registered proprietor) on the instructions or with the authorization or the consent of the registered proprietor.

5. Is an order for sale made pursuant to a lien-holder's caveat created by the deposit of the issue document of title by a third party with the consent of the registered proprietor considered to be illegal and consequently liable to be set aside.

A As regards Staghorn, this court granted it leave to appeal without specifying any question that would render an appeal qualified under s. 96(a) of the Courts of Judicature Act 1964.

[137] Of the aforesaid five questions, Question No. 1, with its
B description of the intended intervener as a person who "is found to have no proprietary rights/interest in the said land", concerned the intended intervener's, in this case Staghorn's personal qualification to intervene. The other questions arose from the Court of Appeal's findings of contraventions of s. 281 of the
C National Land Code which were made to show the existence in this case of an exception under Badiaddin to the rule that an order regularly obtained that has been perfected cannot be set aside, which rule was, as I perceived from the judgment of the Court of Appeal, set up by Hong Leong and Wong to argue that,
D even if Staghorn had the personal qualification to intervene, it ought not to be allowed to intervene because the object of the intervention was beyond attainment.

[138] As I said, Question No. 1 concerned the intended
E intervener's personal qualification to intervene, the stated purpose of intervening being to have an order for sale set aside, that is, to undo what had been done. In this case, only two authorities had been cited as having a bearing on the question, namely, *Pegang Mining* and *Arab Malaysian Merchant Bank*. *Pegang Mining*
F concerned the application of O. 16 r. 11 of the Rules of the Supreme Court 1957, the precursor of the present O. 15 r. 6(2)(b), sub-para. (i). It applied the court rule as to the addition of an additional party, as I believe it should be applied, to an ongoing case in order to enable the additional party to participate
G in the process of bringing the case to an overall satisfactory and just conclusion. *Arab Malaysian Merchant Bank* concerned the application of O. 15 r. 6(2)(b) and it was applied so as to enable a person to come into a cause that had been decided in order to have the decision set aside. That was then the only authority that
H fitted the circumstances of Question No. 1. As has been seen, the subject matter in that case was a debt and the intended intervener had an interest in it because he had undertaken to pay it and he was allowed to intervene to set aside the judgment debt because otherwise he would have had to bear the excessive interest.
I Therefore, applying that authority to Question No. 1, the intended intervener must have an interest in the subject matter of the case, and if he seeks to intervene to set aside an order for sale of land he must have an interest in the land. If he is found to have no

proprietary rights in the land, he is not qualified to intervene. Even if the principles in Pegang Mining were bent or modified and applied to Question No. 1, the result would be the same. The party to be added to an action must have sufficient interest in the subject matter of the action. The answer to Question No. 1 had therefore to be a negative one.

[139] I have now to state how I considered the answer to Question No. 1 affected Staghorn. The Court of Appeal decided that Staghorn was correctly allowed to intervene "since Staghorn is claiming that its rights would be affected by any judgment in the proceeding in this case". *Pegang Mining*, *Arab Malaysian Merchant Bank* and *Gurtner v. Circuit* all show that the interest of a would-be intervener in the subject matter of the action in which he seeks to intervene must be shown to exist. He is not to be allowed to intervene merely on a claim that he has an interest in the subject matter. The "flexibility of approach" mentioned in *Pegang Mining* is not to be taken to mean laxity in the standard for the qualification to intervene.

[140] But what is more important in this case is the positive finding by the Court of Appeal, as justification for setting aside the orders recognizing Staghorn to be the beneficial owner of the land, that Staghorn had divested itself of its rights and interests in the land to Teck Lay and that Teck Lay was the beneficial owner of the land. That was a finding of fact made after considering all documentary evidence in this case, some of which I have set out. I dare say that Question No. 1 must have been framed with that finding in mind in view of the words "is found to have no proprietary interest in the said land". It was argued on behalf of Staghorn that that finding was null and void because it conflicted with the Court of Appeal's earlier finding when deciding that Staghorn was qualified to intervene. But as has been seen, that was not a finding that Staghorn possessed beneficial interest in the land. It was merely a statement of Staghorn's claim. When making that statement the Court of Appeal would already have found in their minds that Staghorn had no beneficial interest in the land, but it would appear that they thought, being influenced by the words "flexibility of approach" in *Pegang Mining*, that for the purpose of being allowed to intervene to set aside the order for sale and the auction sale, it did not matter that Staghorn was not the beneficial owner of the land, and that it was sufficient that it claimed that its interests would be affected. I cannot now help

feeling that the case for setting aside appeared to the Court of Appeal to be so obvious that somehow Staghorn must be held to be qualified to intervene to have the orders set aside.

[141] In support of its appeal, Staghorn argued strenuously and at length in its written submission against the finding of the Court of Appeal that it had divested itself of its interests in the land to Teck Lay, but I agreed with Hong Leong's submission that this was a finding of fact that these appeals afforded no scope for this court to examine its correctness. I will, however, say this. It seemed to me that Staghorn was not saying that the evidence did not show that Staghorn had divested itself of its interests in the land. *Staghorn*'s case, as pleaded in its affidavit in support of its application in the High Court, was that Staghorn was supposed to resell the land to Teck Lay but since the sale by Staghorn to Teck Lay was aborted Staghorn remained the beneficial owner of the land. Staghorn did not present any documentary evidence to support the allegation of intended resale to Teck Lay but it argued that the evidence, which otherwise would prove a divesting of rights by Staghorn to Teck Lay, fitted with the scenario of the alleged resale. In other words, without the allegation of intended resale, the evidence only pointed to divesting of rights by Staghorn to Teck Lay.

[142] The Court of Appeal were aware of Staghorn's allegation of intended resale. This is what they said about Staghorn's application in the course of setting out the facts and history of this case:

> The grounds proferred by Staghorn in support of this application are: Staghorn is actually the beneficial owner of the said land since it has paid 10% of the purchase price. Originally Staghorn intended to sell its beneficial interest in the said land to [Teck Lay] but this sale did not materialize. When this deal fell through, Staghorn claims that it continues to be its beneficial owner. Though admitting that Staghorn did not pay for the balance of the purchase price for the said land, Staghorn argues that [Teck Lay] has paid on its behalf under a sort of internal inter company arrangement 'which has nothing to do with the parties in these proceedings'."

The Court of Appeal then went on to say as regards Hong Leong's stand:

> [Hong Leong] rejected these assertions as preposterous. [Hong Leong] maintained that [Teck Lay] is the nominee of Staghorn and all contemporaneous documents point to this fact viz: the execution by [Teck Lay] as transferee on the memorandum of transfer; the resolution of [Teck Lay], signed by no other than Set" ? a director of Staghorn and Teck Lay ? "himself, declaring [Teck Lay] has agreed to charge the said land in favour of [Hong Leong], the creation of the charge in escrow in favour of [Hong Leong]; the acknowledgement by the [two vendors] that [Teck Lay] has paid the full purchase price and various others.

By finding that the evidence proved that Staghorn had divested itself of its interests in the land to Teck Lay, the Court of Appeal must have rejected Staghorn's bare allegation of intended resale to Teck Lay, which to me was hardly surprising.

[143] Having found that Staghorn had no interest in the land, which they must have done in their minds when deciding on the intervention, the Court of Appeal erred in concluding that Staghorn was correctly allowed to intervene.

[144] I will now deal with the questions relating to s. 281 of the National Land Code. I will begin by saying that the case of *Palaniappa Chetty* that the Court of Appeal relied on did not lay down, and does not provide any justification for concluding as the Court of Appeal did, that the depositing of the issue document of title under sub-s. (1) of s. 281 must be done by the registered proprietor himself or that the loan as security for which the issue document of title is deposited must be a loan to the registered proprietor. Those questions did not arise in *Palaniappa Chetty*. The provision that was involved in that case was s. 80 of the now defunct Registration of Titles Enactment 1911 of the Federated Malay States, which provided as follows:

> 80. A lien may be created by deposit of the grant or certificate of title. The holder shall have the power at any time during the existence of his lien to enter a caveat in manner set forth in Part XII hereof to prevent all dealing with the land and when he has obtained a judgment of the Court for the actual sum due, he shall be entitled to apply for and obtain an immediate order of sale of the land.

The question that arose for decision by the Court of Appeal of the Federated Malay States was whether a lien created by deposit of a grant or certificate of title under the section afforded a security for a loan in respect of which the lien was created and gave priority to the lien-holder over unsecured creditors of the

borrower as regards of the proceeds of sale of the land when it came to be sold pursuant to an order of sale obtained under the section. The question arose because the court below had held that the lien did not afford a security and gave no such priority. The answer to that question depended on the meaning of the word "lien" in the section and the passage cited by the Court of Appeal in the present case was that in which Whitley JC considered that question. The passage is as follows:

> From these considerations it is evident that section 80 does not itself contain a definition of the word "lien" and its meaning must therefore be sought elsewhere. The interpretation section of the Enactment being silent on the point, it is necessary to construe the word according to its ordinary legal meaning. The following definition is given in '*Halsbury's Laws of England*,' Vol. 19, page 2:
>
> > Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another man until certain demands of the person in possession are satisfied.
>
> Applying this definition to the present case, appellant had the right to retain grant No. 5138 until the loan in respect of which it was deposited was repaid. This right of retention is inconsistent with the exercise by the registered proprietor of his right to deal with the land. The registered proprietor, therefore, has, for the purposes of the lien, surrendered that right. It follows, I think, that he has pledged the land as security for the loan, and has conferred upon the lien-holder a right, analogous to that possessed by an equitable mortgagee in countries where such mortgages are recognized.
>
> That the Registration of Titles Enactment recognizes the right to be of that character is, I think, evident from that part of section 80 which provides that a lien-holder may enter a caveat. The policy of the Enactment is to restrict the right to enter a caveat to persons who have, or who claim to have, an interest in the land. The conferring of this right upon a lien-holder is conclusive evidence to my mind that the Legislature intended the debt due by the registered proprietor to the lien holder to be a charge upon the land.

[145] Subsection (1) of s. 281 speaks of the registered proprietor depositing his issue document of title "as security for a loan" but does not specify the borrower and neither does it restrict the loan to a loan to the registered proprietor. I could see no reason for construing the loan to mean only a loan to the registered

proprietor. In my judgment the loan may be a loan to a third party. That would have been my answer to Question No. 2. Where the loan is to a third party, it must follow that under subsection (2) the judgment obtained is a judgment against the third-party borrower. That would have been my answer to Question No. 3.

[146] Subsection (1) of s. 281 is an enabling or empowering provision. It enables or empowers the registered proprietor to deposit his issue document of title with any person or body as security for a loan. It does not lay down the procedure for or the manner of depositing. It ought not to be construed as requiring that the registered proprietor himself must do the act of depositing. It is his will that is important. If he wills that the document of title be deposited with a person or body as security for a loan and it is so deposited, then it is he who has exercised his power under sub-s. (1). He wills the depositing if he instructs or authorizes it or consents to it, and the actual act of depositing may be done by someone else. That would have been my answer to Question No. 4. It follows that my answer to Question No. 5 would have been a negative one.

[147] But while those would have been my answers to Questions Nos. 4 and 5 as they were framed, a person reading the facts of this case as I have set them out will ask whether the registered proprietors in this case did instruct or authorize or consent that the issue document of title to the land be deposited with Hong Leong as security for the loan to Park Avenue. It was submitted on behalf of Hong Leong that the registered proprietors had consented to the deposit of the issue document of title with Hong Leong as security for the loan to Park Avenue and that submission relied primarily on an affidavit dated 20 May 1985 by one of the registered proprietors, which had been filed in an action by Hong Leong against BBMB, in which he said: "As the full purchase price in respect of the said land has been paid we would have had no objections to the purchaser or his nominee dealing with the document of title in any way it chose, including depositing it with any person as security for any loan". Having received the full purchase price, there could be no doubt that, at the time when they parted with the issue document of title in July 1981, they were not concerned with what was done subsequently with it. They had no more interest in it and were indifferent to what might be done with it. They no longer had any will to exercise with regard to it. Therefore if their consent had been

A sought for it to be deposited with Hong Leong, the chances were that, as may be implied from what was said in that affidavit several years later, they would have automatically given their consent. But could it be said that when the depositing was done it was with their consent? Does general indifference amount to consent to a
B specific act? Hong Leong's submission did not go so far as to answer those questions affirmatively and with the backing of authority, and Staghorn had not responded at all to Hong Leong's contention of consent. I am therefore not disposed to answer those questions with finality although in the absence of
C authority it seems to me difficult to answer those questions in the affirmative. But it was not necessary in order to dispose of these appeals to answer those questions, because even if on the facts of this case it could not be said that the depositing of the issue document of title with Hong Leong was by the registered
D proprietors and therefore it could not be said that the depositing was in conformity with sub-s. (1) of s. 281, this was not a defect that fell within the special exception, as set out in *Badiaddin*, to the rule that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent
E jurisdiction. It was not a defect, to use the words in Badiaddin, "of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice". The justice that would need to be done if the depositing of the issue document of title was not by the registered proprietors was justice
F to them, because the person who would suffer the consequences of a depositing of an issue document of title that is wrongful in the light of sub-s. (1) is the registered proprietor. But there was no call for justice to be done in this case to the registered proprietors because they were no longer interested in the land. It
G could not have mattered to them that the issue document of title had been deposited with Hong Leong. They were brought in as defendants at the stage when the depositing came to the consequence that Hong Leong applied that the land be sold, but they did not oppose the application. Had they been approached
H for their consent to the depositing, it was most likely that they had given it, and then there would have been no ground for Staghorn to seek to set aside the order for sale and to resort to *Badiaddin* for the purpose. There could be no question of doing justice to Staghorn because Staghorn itself had withdrawn its
I caveat in order to enable Hong Leong's lien-holder's caveat to be entered.

[148] On the facts of this case, therefore, the Court of Appeal erred in applying *Badiaddin* to find that the order for sale and the auction sale could be set aside *ex debito justitiae*. It was a misplaced reliance on Badiaddin. Staghorn should not have been found to have been properly allowed to intervene, because the object of the intervention was beyond attainment and also because, with the finding that it had no interest in the land, it was not qualified to intervene.

[149] When these appeals were decided on 26 December 2007, I agreed with the conclusions in the penultimate paragraph of the judgment of the learned Chief Justice which I had read in draft, but as the learned Chief Justice indicated in the last paragraph of his judgment, I would be writing a separate judgment, which I had not been able to do when these appeals were decided. I have now given my reasons for agreeing with the said conclusions arrived at by the learned Chief Justice. I will add that I was also in agreement with that part of the learned Chief Justice's judgment in which he dealt with Staghorn's preliminary objection.

Azmel Maamor FCJ:

[150] I have the benefit of reading the judgment in draft of my learned brother Abdul Hamid bin Haji Mohamad PCA (now CJ). After having considered the judgment I would agree with the views expressed and the decision arrived by him. I would also order that costs be awarded to Hong Leong Bank Berhad and Wong Bin Chen @ Ng Chi Leong here and the courts below.